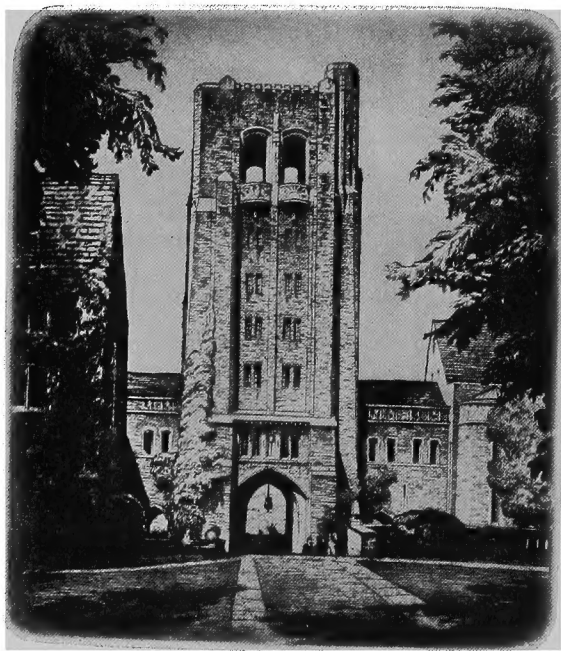


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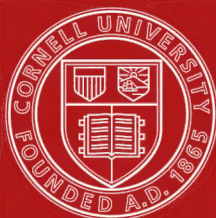
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LAW OF CONTRACT

BY

Keop 11/09
WILLIAM T. BRANTLY

Reporter of the Court of Appeals of Maryland; Author of the Law of
Personal Property, etc.; Formerly Professor of Law
in the University of Maryland.

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I have endeavored, in this revised edition of a book on the law of contract which was published some years ago, to set forth, with as much clearness and conciseness as I could command, the leading principles in all parts of the subject. The treatment of some matters, concerning which the authorities are conflicting, has been more elaborate than that of others where there is no difficulty for this reason. In dealing with Conditional Contracts, I have borrowed from the civil law a classification not used by English or American writers, but one which seems to me to aid greatly in simplifying an important subject where the rulings are confused and the terminology perplexing.

Writers on the law of contract in this generation owe a debt of gratitude to the works of Sir W. R. Anson and Sir F. Pollock which I wish to acknowledge. Other books on the subject, both before and since these works, have successfully collected or digested the decisions of the Courts, but they lack the system and the steady grasp of principle of the writers I have named.

By means of his classification of the subject, Sir W. Anson has effected both a quantitative and a qualitative simplification of the law of contract. The substance of the law as formulated in the decisions of the courts for several centuries is admirably adapted to promote justice, and is a part of the intellectual capital of humanity. But these decisions are so numerous, so full of refined distinctions, so difficult of access, that the problem is how to state this established law in such a form that its application in practice is simplified and facilitated. In a discussion of what he calls legal technique by that very suggestive writer, Von Ihering, it is said that, to the question of how to state the law, common sense has no other answer than this—by a clear, precise and detailed compilation of the laws. But, he continues, the solution of the problem by jurisprudence, that is, by expe-

rience in matter of law, will be quite different. The qualities referred to are important, but are not sufficient. What is the value of the most detailed and precise laws, if, with the best will in the world, the judges and lawyers can scarcely know them all, or if the technique lacks the flexibility necessary for properly transforming the abstract into reality? Legal science forgets too readily that it should also be an art. And the mission of juridical art is to make easier the knowledge and application of a complicated and extended system of law. Contrary to the general opinion of practical lawyers, according to whom the question of system is only one of theoretical interest or of pure form, Von Ihering declares that too much stress cannot be laid upon its practical importance.

I have not aimed to make a collection of most of the cases except upon a few disputed questions. If one has a clear perception of principles he can easily find recent cases involving their application. I have rather sought to select cases which afford apt illustrations of the rules under discussion. These illustrations I have drawn from many different branches of the law. It has been said that the principles of the law of contract are the immutable columns of the science of jurisprudence.

W. T. BRANTLY.

February, 1912.

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PART I

THE NATURE OF CONTRACT

§ 1. **Agreement and Obligation.** A contract is the agreement of two or more persons by which an obligation is created between them. The essential elements of a contract are therefore agreement and obligation. To know what a contract is we must ask, what is an obligation and what is the nature of the agreement that gives birth to an obligation. Every contract is an agreement but every agreement is not a contract. Agreement is the genus of which contract

CORRIGENDA.

On page 4, in 3rd line from top, after word *parties*, insert *where one*.

On page 89, in 5th line from bottom, for *madatum*, read *mandatum*.

On page 217, in 11th line from top, for *jurdicus*, read *juridicus*.

On page 390, in note 1, for *noviatio*, read *novatio*.

On page 423, in 7th line from top, for *have*, read *has*.

On page 439, in 4th line from bottom, for *Master of Rolls*, read *Master of the Rolls*.

to be done or forbore which is the object of the agreement

§ 2. **Rights in Rem and in Personam.** A right is the power, faculty or capacity which the law confers upon a man of doing, not doing, or exacting anything. The acquisition, change or loss of a right is caused by facts or events; and every controversy turns in the first place upon their existence. The facts which create or destroy rights are those to which the law attaches a meaning or effect. This legal significance is generally one inherent in the real nature of the fact to which it is attributed. The ultimate basis of most rights, especially those created by contract, is ethical. When two men make solemn promises to one another, good faith and

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THE NATURE OF CONTRACT

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An agreement is the accord or consent of two or more persons upon a certain matter and that kind of agreement which is made for the purpose of creating an obligation and which is sufficient in law to create it is a contract. The requisites of the agreement which results in a contract are: (1) The existence of a legally enforceable right to demand that a person shall do or abstain from doing something. (2) A person who possesses this right, who is the active subject of it. (3) Another person who is under the obligation to do or forbear, who is the passive subject of the right. (4) A thing to be done or forborne which is the object of the agreement.

§ 2. **Rights in Rem and in Personam.** A right is the power, faculty or capacity which the law confers upon a man of doing, not doing, or exacting anything. The acquisition, change or loss of a right is caused by facts or events; and every controversy turns in the first place upon their existence. The facts which create or destroy rights are those to which the law attaches a meaning or effect. This legal significance is generally one inherent in the real nature of the fact to which it is attributed. The ultimate basis of most rights, especially those created by contract, is ethical. When two men make solemn promises to one another, good faith and

natural equity demand that the promises should be performed. This natural right is enforced by law when the promise is made under certain prescribed conditions.

Since law is a function of reason and justice is the foundation of the State, all those rights are enforced which the State considers should reasonably and in justice to both parties, and with due regard to the public welfare be enforced. Therefore a particular right is created when all the circumstances concur which the law has endowed with the power of creating a right of that kind. Consequently the maxim, *ubi jus, ibi remedium*, really means that if there is no remedy afforded by the law in a given case, then no legal right exists, or in other words, that all the facts necessary for the creation of the right do not exist.

There can be no right without a corresponding obligation. In some cases this correlative obligation is laid upon all the world indiscriminately, and consists merely in the duty of forbearance. Such is the case when the right is that of ownership in a house or a book or other subject of property, and the right is then called a *jus in rem*, or *in re*.

In other cases there may be no definite ascertained thing to which the right is attached, but the person entitled has a right to demand the payment of a sum of money or a performance of some sort from another. In this case the right consists in the faculty of demanding such payment or performance, and of controlling the action of the other person thereto. This right is called a *jus in personam*. Its immediate object is the control of another's will, and not dominion over an object.

In the case of a *jus in rem* there is no person who is individually the passive subject of the right, so that in its analysis we find, apart from the world at large, which is merely under a duty to abstain from interference, only one person, the active subject, and a thing, the object of the right. The relation of others to the owner is only this, that they are not owners. Every right *in rem*, however, acquires a definite opponent, a passive subject by its violation. So soon as a definite person has put himself in conflict with it, the right

in rem seizes upon this person in the same way that the right *i. e.*, it may be intentionally created in that one party growing out of a contract fastened upon a definite person from the beginning. A relation exists analogous in all respects to a claim arising *ex contractu*,—a certain act of a pecuniary character is demandable from a certain person.

In the case of a *jus in personam*, there exists a person who is specially and individually bound. By force of such a right it may be demanded that another shall determine his will to act in a certain way, shall do or not do a certain thing. This is its immediate object. A right *in personam* is extinguished when the corresponding obligation has been performed. But a right *in rem* continues to exist although the obligation created by its infringement has been fulfilled. This is because the control over another is not the immediate object of such a right, but rather that the will of a person over a given thing shall have free scope.

The person obliged in a right *in personam* is in a relation of dependence upon the other. He is bound, attached; there is a tie between them. The idea of a personal bond is seen in the metaphorical expressions which are used to designate the relations,—*vinculum juris*, obligation, *contractus*, (from *contrahere*). The true subject of an obligation is not a certain thing, but a certain act or performance, which the promisee may demand from the person obliged. This is the fundamental cardinal principle of the law of obligations.¹

An obligation is therefore the legal tie or bond between two or more persons by virtue of which one or more of them are required to do or refrain from doing something in respect of the other. Property is the legal relation existing between a person and a thing.² An obligation is the relation between persons. It is a *jus in personam* from the point of view of the passive subject.

¹ *Obligationum substantia non in eo consistit ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum. Digest 41, 7, 3*

² *Obligatio est juris vinculum quo necessitate adstringimur alieni solvenda rei secundum nostrae civitatis iura. Institutes, 3, 13*

§ 3. **Classification of Obligations.** Obligations are designated according to their different modes of origin. An obligation may be founded in the free will of the parties; *ω* promises a certain thing to another who accepts the promise. An obligation may also arise from unauthorized acts, or from an act voluntarily done and not illegal, but which was not the result of an agreement to create an obligation or again from particular circumstances and relations between the parties.

Rights arise, therefore, either (*a*) from the will of individuals; or, (*b*) from the will of the law. But even in the first case as previously shown, the real origin of the right is not so much the individual will as the fact that the law says that under certain circumstances such will shall create a right and obligation.

Thus the sources of obligations may be reduced to the following classes:

1. The mutual consent of the parties. This creates an obligation *ex contractu*.

2. Circumstances by which one person may have injured another, or infringed some right belonging to another,—cases governed by the maxim that one ought to repair the evil which he has wrongfully caused. These create obligations *ex delicto*, or torts.

3. Circumstances in consequence of which one person finds himself, either voluntarily or involuntarily, enriched by the property, or benefited by the act of another. These create obligations *quasi ex contractu*.

4. Certain relations between persons in the constitution of the family or of society.

§ 4. **Obligations ex Contractu.** We are concerned only with those obligations, called contracts, which are created by the voluntary act and common consent of two or more persons. The obligatory principle of such agreements lies only in the union of the wills of the parties that an obligation shall exist between them. We are to consider as of primary importance not the thing promised, but the performance.

"The specific mark of contract is the creation of a right, not to a thing, but to another man's conduct in the future."¹

Savigny exhibits the essential characteristics of a contract by the analysis of a case where it obviously exists,—a contract of sale. "The first thing that we remark," he says,² "are several persons in the presence of one another. In this particular case, as in most contracts, there are exactly two persons, but sometimes, as in the contract of a partnership, the number of persons is undetermined, and so we must let the general idea of plurality remain. It is next necessary that these persons should will a thing, and the same thing, for as long as there is doubt or disagreement between them the existence of a contract cannot be admitted. The consent of the persons should be manifested, that is to say they should reciprocally declare their will, for a decision made but held secret cannot be accounted as one of the elements of a contract.

"Moreover attention must be paid to the object of their will. If two persons agree to sustain one another by their mutual advice or example in the pursuit of virtue, or of science, or of art, the name of contract if given to such agreement would be altogether improper. This convention differs from a sale, which is a true contract, in this, that in a sale the will of the parties has a legal relation for its object, while here the object is of a different nature.

"But it is not sufficient that the object of an agreement should be a legal relation. When the members of a tribunal, after long debates, agree upon the judgment to be pronounced, all the conditions enumerated above are united, and the object of their agreement is a legal relation,—still that is not a contract. This is because the legal relation is not personal to them, does not affect them personally as in the case of a sale.

"These different conditions may be resumed in the following definition: A contract is the agreement of several persons

¹ Pollock, Contracts, p. 1

² System, § 140.

in an expression of their common will, designed to regulate their legal relations."³

§ 5. **Bilateral and Unilateral Contracts.** If the agreement makes both parties creditors and debtors, promisors and promisees, in turn one of the other, we have what is called a bilateral contract—there is a promise on each side.

If on the other hand, one party only becomes debtor or promisor, so that nothing can be demanded by virtue of the contract from the other party, the agreement is unilateral—the promise is *ex uno latere*.

Contracts of sale, hiring or for future work are examples of bilateral contracts. Contracts of loan and depositum and those which impose an obligation on one party only are unilateral.

§ 6. **Requisites of a Contract.** The essential elements of a valid contract are these:

1. The consent or agreement of two persons. The consent must be communicated between the two or manifested in some external manner. This subject is treated in the next chapter under the head of Offer and Acceptance.

2. A definite or ascertainable object which constitutes the subject-matter of the agreement. This is considered in the next chapter under the head of Certainty.

3. The agreement must either be based upon a consideration or be expressed in the solemn form prescribed by law. These requisites are dealt with in the chapters relating to Consideration and Form.

4. The person who makes the promise must be legally capable of entering into that particular kind of contract. This is considered in the chapter relating to Capacity of Parties.

³ The preceding sections have been based in part on Windscheid's *Pandektenrecht*, §§ 43, 63, 251; Puchta's *Institutionem*, § 251; Demolombe, *Contrats*, vol. i, ch. i.

5. The consent of the parties and its outward expression must be real and genuine. The promisor must have meant what he said and his manifestation of consent must not have been extorted by fear or fraud or error. These requisites are considered in the chapters dealing with mistake, misrepresentation, fraud, duress and undue influence.

6. The subject matter of the agreement must be one which the law permits to be accomplished. This is treated in the chapter relating to Legality of Object.

PART II

REQUISITES OF A CONTRACT

CHAPTER I

AGREEMENT—OFFER AND ACCEPTANCE

§ 7. **In General—Necessity of Offer and Acceptance.** The first requisite of a valid contract is the agreement of two persons in willing the same thing,—their consent, the meeting of their minds. It is obvious that there can be no agreement unless there be some external act manifesting and communicating the common purpose of the parties; the outward and visible sign of their inner will. The purpose of the one must be communicated in some manner to the other, who in turn must indicate that his purpose corresponds with that communicated to him. This accord of two wills is not brought about by two persons simultaneously expressing precisely the same intention. In a contract, one person promises to do some one thing, or shows that he intends to do it, and the other person exhibits his agreement and consent, not by expressing his purpose to do the same thing himself, but by expressing his willingness or expectation that the proposer shall do the thing offered. If the proposer asks by his offer that something be done by the other person in turn, then the latter assents by his promise to do that thing, or by his actually doing it.

The initiative must needs be taken by one of the parties who makes a certain proposal or offer to the other, thus asking him to unite in creating an obligation. The offer is the first step in the formation of a contract, the first link in the legal chain which constitutes the obligation. If the other accepts this offer and expresses an analogous purpose, the parties are agreed,—their wills have coalesced, they have come together and made a convention (*convenire*). Numerous offers and counter offers may be exchanged before finally

the offer of one party is met by an unqualified acceptance of the other, and the initiative may have been taken by the party who becomes the promisee.

Offer and acceptance are then the two essential and inseparable elements of consent. "Every agreement begins with an offer and is completed by an acceptance. Suppress one of these elements and you have absolutely nothing. An offer unaccepted is a sterile act, powerless to create a right, and an acceptance without a preliminary offer is an impossible and absurd notion."¹

When a landlord and tenant sign at the same time a lease which has been prepared for them, that transaction has been preceded by an offer from the one or the other and its acceptance.

Agreement is the reciprocal manifestation of the complete accord of two or more persons for the purpose of binding each to a performance towards the other, or for the purpose of binding one only to the other, who accepts without himself assuming any corresponding obligation. Consent therefore is never an unilateral fact. The contract may be unilateral, but the cause must not be confounded with the effect, that is to say, the agreement with the contract. Even when the contract binds one person only, the agreement which created it must have been bilateral, for the simple reason that no promise binds the promisor unless it is accepted by the promisee.² The apparent exception in the case of an absolute promise under seal is to be explained by the circumstance that acceptance is presumed until the offeree declares his dissent.

To the definition of contract as an agreement creating an obligation, it has been objected that there are certainly some valid contracts which do not create obligations, as for instance, an agreement to rescind or discharge a pre-existing contract, in which case, there is no bringing together of the parties but rather a putting of them asunder; or a sale for cash, as when one takes a book from a stall at the same time

¹ Larombière (*Oblig.*), i, 6,

² Giorgi, *Teoria delle Obbligazioni*, vol. iii, n. 138.

handing the price to the bookseller, in which case there is no outstanding obligation at any time. This criticism is largely a matter of words and does not affect the substance of the principle. In the first example, the agreement to dissolve a contract, while in a certain sense it does not create an obligation, yet it does create a new legal relation between the parties,—it binds each not to enforce the former undertaking.³ The word contract is to be taken in a broad sense as embracing all enforceable agreements of the parties concerning their legal relations. So in the case of a sale for cash, or the simultaneous exchange of property for money, while it does not create a personal obligation, it does create a property right changing the ownership of the thing and thus relating to the legal rights of the parties. The object of the agreement therefore, may be the creation of an obligation binding upon one or both of the parties or the transfer of ownership or the extinguishment or modification of an existing obligation.

§ 8. **Forms of Offer,** An offer may be:

- (a) A mere naked absolute promise.
- (b) A promise accompanied by an express or implied request for acceptance by an act.
- (c) A promise with a request for a counter promise.
- (d) An act accompanied by a request express or implied for a promise.¹

(a) In the case of an absolute promise, where the contract is concluded by simple assent or acceptance, the promise must be under seal, because in our law only those promises

³ This particular criticism is not applicable to Pothier's definition (Oblig. n. 3): "An agreement or pact is the consent of two or more persons to create between themselves an engagement, or to dissolve one previously existing or to modify it."

¹ In Roman law one division of the consensual contracts was into these four classes. *Aut enim do tibi ut des, aut do ut facias, aut facio ut des, aut facio ut facias.* Dig. 19, 5, 5, pr.

are enforced which are either under seal or are supported by a consideration. The acceptance of the offeree is presumed, since the promise is for his benefit. But he may declare his dissent and then the offer falls.² "If I by deed promise to give you £ 20 here you shall have an action of debt upon this deed, and the consideration is not examinable; it is sufficient to say it was the will of the party who made the deed."³ As a general rule, the instrument must be delivered to the other party or to someone for him.⁴ But if the promisor retains possession of it after showing that he intended it to go into effect at once, that is sufficient.⁵

A promise under seal to sell certain property if the promisee pays the purchase price within a designated time is an irrevocable unilateral contract binding on the promisor, which may be converted into a bilateral contract, at the option of the promisee by his acceptance in the mode prescribed.⁶

(b) The offer of a promise for an act is made when a man offers a reward for the return of lost property, in which case the contract is completed by performance according to the terms of the offer.⁷ If one promises to pay the debt of a third party, provided the creditor will not institute suit against him, and the creditor does forbear, such forbearance is an act by which the promise is accepted.⁸ If a man is lawfully appointed District Attorney, that is a request made to him by the proper authority to render the services demanded of that office and a promise to pay the com-

² *Leppoc v. Nat. Union Bank*, 32 Md. 145; *Standing v. Bowring*, L. R. 31 Ch. D. 282, 290.

³ *Sharington v. Stratton*, Plowden, 308.

⁴ See *post*, ch. iii, as to contracts under seal generally.

⁵ *Xenos v. Wickham*, L. R. 2 H. L. 296.

⁶ See *post*, Conditional Contracts, Part v, ch. 1.

⁷ See *post*, § 18.

⁸ *Bowen v. Tipton*, 64 Md. 275. Four of the five endorsers of a promissory note executed and delivered an instrument under seal by which they requested the fifth endorser—the plaintiff—to pay the note at maturity, and agreed to refund the amount thereof in certain proportions. Upon payment of the note by the plaintiff a binding contract to reimburse him was made by such act, and no other acceptance of the offer was necessary. *Sharp v. Bates*, 102 Md. 344.

pensation fixed by law. When the services are rendered as requested, the obligation to pay is perfect, and no element of a contract is lacking.⁹

(c) In the offer of a promise for a promise, the acceptance consists in making the promise asked for. When an order for the manufacture of goods is given, the promise of the manufacturer to make them completes the contract.¹⁰ If the offer requires a counter promise, it is not sufficient for the offeree to do the act called for without the knowledge of the offeror. Thus, if one writes to a carpenter saying that upon his agreeing to do certain work within a designated time, he will be employed, he must communicate his promise, and the mere fact that he makes preparations for doing the work without the knowledge of the proposer is not an acceptance, and the offer may be revoked.¹¹

(d) In the offer of an act for a promise, the act must be done with the knowledge of the offeree so that he may know that the creation of a legal obligation is contemplated. If you are standing at your window after a snowstorm, when a man comes along with a shovel, who after motioning to you and seeing an affirmative nod of your head, begins to clear, the snow away from your sidewalk, he offers an act for a promise, and your acquiescence implies a promise on your part to pay a reasonable price. If he had done the work without your knowledge, no contract would have been made because there was no communication of the offer.¹² Generally, the rendition of services for another with the expectation of being paid for them and with the knowledge of the latter, is *prima facie* evidence of the acceptance of the services and of a promise to pay.¹³

Most contracts are made by the mere agreement of the parties, and nothing more is essential, neither the performance of the work, nor the delivery of a thing, nor a writing

⁹ *Fisk v. Jefferson Police Jury*, 116 U. S. 134.

¹⁰ *Eckenrode v. Chemical Co.*, 55 Md. 51.

¹¹ *White v. Corlies*, 46 N. Y. 417.

¹² *Doan v. Badger*, 12 Mass. 65. See cases, *post*, § 10, as to communication of offer by conduct.

¹³ Cases, *post*, § 10.

nor any special form of words. But there are some contracts formed, not so much by the offer of an act for a promise as by the doing of the act, which do not become effective until an act has been done or the thing to which they relate has been delivered. In the case of the loan of an article or of money, or the bailment of *depositum*, a promise to make the loan or to accept custody of the article, although assented to by the other party, does not create a contract for lack of consideration to support the promise. But when the money or the article has been delivered, then a contractual obligation to repay or to redeliver is created. The doing of the act is the consideration which supports the promise.

It will be observed that in all these four modes by which offer and acceptance create a contract, there is a promise on one side at least.

§ 9. Rules Governing Offer and Acceptance:—

- i. The offer must be intended to create a legal obligation.
- ii. The offer may be communicated by conduct or by words, but must be communicated.
- iii. The offer must be certain and definite.
- iv. The offer may lapse or be revoked before acceptance.
- v. An offer is terminated by its rejection.
- vi. The acceptance must be communicated, unless communication be dispensed with.
- vii. The acceptance may be by conduct or silence.
- viii. The acceptance must be absolute and in conformity with the offer.
- ix. The acceptance must be by the person to whom the offer is made unless made to the public.
- x. An absolute acceptance creates the final contract.

These rules will first be explained and illustrated and then their application to contracts formed by correspondence and telegraph will be shown.

§ 10 (i). **The Offer Must be Intended to Create a Legal Obligation.** Since the object of the agreement is to create an obligation, the offer by which it is initiated must be the

expression of a real and definite intention to make one's self a debtor to another. This purpose does not exist if the proposer intended to assume only an obligation of courtesy or honour or charity. Where the manager of a summer resort hotel telegraphed saying, "There are many cases of yellow fever at the Well. Send out physician without fail this evening;" it was held that he was actuated by motives of humanity and did not intend to assume liability to the physician who responded to his call, and that the message was not an offer to pay for his services.¹

When that which is in form an offer was not intended seriously but only as a jest, it is not converted into a contract by an acceptance if the other party knew, or ought to have known, that the proposer did not intend to create a legal obligation.² A marriage ceremony between a man and a woman, although actually performed by a legally qualified celebrant, is not a marriage when both parties at the time intended it as a jest.³

The intention to create an obligation is also lacking when one's proposition was designed to begin negotiations, or as the first step in bargaining, or as the asking for an offer from the other party. In certain instances, it is difficult to determine whether a party intended to make a definite offer, or merely to ask for offers or to begin negotiations. It is a question of interpretation, to be answered by considering the nature of the proposition, the circumstances under which it was made, and the relations between the parties.

Invitations to negotiate and not serious and final offers are made by such propositions as these: A. wrote a letter to B. saying, "Advise us by wire Monday, if you can use about 1,500 creosote barrels, between now and January 1st, at 95c. each, delivered in carload lots." B. answered, "We accept your offer fifteen hundred bbls. as per yours of the 7th." It was held that no contract was made, since A's letter was

¹ Williams v. Brickell, 37 Miss. 682.

² Keller v. Holderman, 11 Mich. 248; Theiss v. Weiss, 166 Pa. 9.

³ McClurg v. Terry, 21 N. J. Eq. 225.

an invitation to enter into negotiations and was not intended to create a legal relation.⁴ Plaintiff wrote to defendant on May 5th, saying, "Are you going to buy cucumbers this year, and what are you going to pay for them. Please let me know as I want to make a contract with someone for them. As you have always dealt fair with me, I would like to sell you some more this year." Defendants replied, "We will be pleased to take all you grow at same price as last year. We will see you later and make final arrangements." No further communication took place between the parties until August, when the plaintiff sent several loads of cucumbers to defendants who accepted and paid for them, nothing being said as to a contract. When defendants refused to take the balance of the crop, an action was brought as for breach of contract. It was held that the defendants' letter was not such an offer as could be turned into a contract, either by acceptance or by delivery of the cucumbers, but was the statement of their readiness to make a contract upon terms to be arranged.⁵

Whether a reference to the preparation of a future writing prevents the formation of a contract until the writing is prepared is considered subsequently.⁶

Another instance of a mere invitation to deal with the proposer, is afforded by a case where the defendants had sent out circulars offering a stock of goods for sale by tender and the plaintiff having sent in the highest bid which was not accepted, claimed that a contract had been thus made. It was held that the circular was not an offer to sell to the highest bidder but was "a mere proclamation that the defendants are ready to chaffer for the sale of the goods and to receive offers for the purchase of them."⁷ So where a committee advertise for proposals for the erection of a building, the advertisement is not an offer. It is merely asking for

⁴ Cherokee Tanning Co. v. W. U. Tel. Co., 143 N. C. 376.

⁵ Baston v. Toronto Fruit Co., 4 Ontario L. R. 20 [1902].

⁶ See *post*, § 17.

⁷ Spencer v. Harding, L. R. 5 C. P. 561.

offers and there is no promise to accept any.⁸ An advertisement that certain goods will be sold at auction does not oblige the auctioneer to put them up. They may be withdrawn without notice, and one who has attended the sale for the purpose of buying them has no right to recover damages. The advertisement is a mere declaration of intention.⁹

A statement as to the price at which a party offers goods for sale without specifying any quantity to be sold or the terms of sale is construed as an invitation to negotiate and not as a definite offer. A., a manufacturer, in answer to a request from B., sent him a priced catalogue of the articles A. was offering for sale with the statement that the prices were to hold good until 30th of September. On the 22nd of September, the agent of A. called on B. and authorized a modification of the catalogue prices, and on the same day, B. ordered certain goods which order was filled. On September 27th, B. ordered other goods, but a dispute having arisen as to a collateral matter, the order was not filled then, and subsequently A. was unable to comply with it. Suit was brought to recover the price of the goods delivered upon the order of 22nd of September. B. claimed a right to setoff the damages sustained by him in consequence of A.'s failure to comply with the order of 27 September, and the only question was whether A. was bound to fill that order. The Court said: "It is quite obvious that no contract was ever made between the parties in respect to the sale of goods described in the order of September 27th. Their minds never met as to some of the elements necessary to constitute a valid contract. The catalogue of prices containing a statement of terms of sale, delivered to defendant by plaintiff in

⁸ *Howard v. Industrial School*, 78 Me. 230. Even where a statute requires a municipal contract to be awarded to the lowest bidder, the person who submits the lowest bid does not thereby acquire a contractual right. *Molloy v. New Rochelle*, 198 N. Y. 402; 30 L. R. A. (N. S.) 126. Cf. *Packard v. Hayes*, 94 Md. 233; *Baltimore City v. Flack*, 104 Md. 107; *Edge Moor Works v. Bristol*, 170 Mass. 528.

⁹ *Harris v. Nickerson*, L. R. 8 Q. B. 286; *Anderson v. Wisconsin C. R. Co.*, 107 Minn. 296; 20 L. R. A. (N. S.) 1133. See note to *Wilman v. Dunman*, 57 L. R. A. 784.

August, contained no proposition as to the *amount* of goods which the plaintiff was willing to sell on the terms stated; and until an offer is made by one party complete and definite in all material terms, it is not possible for another to make a valid contract by the mere acceptance of the proposition. In other words, so long as there remains any of the material conditions of a contract to be settled and agreed upon, no binding agreement exists."¹⁰

In another case, plaintiff wrote to one Ryan saying, "Have you any more northwestern mess pork or prime mess, also extra mess? Telegraph price upon receipt of this." Ryan replied, "Letter received, no light mess here. Extra mess \$28.75." Plaintiff telegraphed in reply, "Dispatch received. Will take 200 extra mess price named." It was held that the letter and telegrams did not constitute a contract, because Ryan's dispatch was not an offer to sell any given quantity of pork, and the plaintiff's message was not the acceptance of an offer.¹¹ In this case what purported to be an acceptance, was in reality the first offer which was not accepted. The following proposition was contained in a letter from defendant to plaintiff: "We are authorized to offer Michigan fine salt in full carloads of 80 to 95 bbls. delivered in your city at 85c. per bbl." Plaintiff replied, "Your letter of yesterday received and noted. You may ship me 2,000 bbls. of Michigan fine salt, as offered in your letter." It was held that the first letter was merely an invitation to deal with the defendant and not an offer to sell any amount, or any reasonable amount, the plaintiff might order and therefore defendant was not bound to fill the order.¹²

The rule that the offer must be intended seriously is to be taken in connection with the general principle that a man will be held to mean what a reasonable person would infer from his words that he did mean, and is estopped to assert the contrary.

¹⁰ *Schnectady Stove Co. v. Holbrook*, 101 N. Y. 45.

¹¹ *Beaupré v. Pacific, etc., Co.*, 21 Minn. 155.

¹² *Moulton v. Kershaw*, 59 Wis. 316. This case was followed in *Allen v. Kirwan*, 159 Pa. 618.

"If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief, enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."¹³

If you ask the owner of a house at what price he would be willing to sell it, and he replies by naming a price, that does not constitute an offer which you are authorized to turn into a contract by acceptance. He may say that he did not offer to sell to you, that he did not regard you as a desirable neighbor, or that he intended to impose restrictions upon the use of the property. "The mere statement of the price at which property is held cannot be understood as an offer to sell. The seller may desire to choose the purchaser and may not be willing to part with his property to any one who offers his price."¹⁴

But when you ask the owner of property if he will sell it to you, and at what price, and he replies by naming a price, that is an offer which your acceptance turns into a contract; and he should not be allowed to say that he did not mean what his words fairly implied. That it should be so, seems to be obvious in the light of common sense as well as of the principles relating to offer and acceptance. But a contrary ruling was made in *Harvey v. Facey*.¹⁵ In that case, plaintiffs telegraphed to the defendant, "Will you sell us Bumper Hall Pen. Telegraph lowest cash price." Defendant telegraphed in reply, "Lowest price for Bumper Hall Pen £ 900." Then plaintiffs telegraphed, "We agree to buy Bumper Hall Pen for £ 900 asked by you. Please send us

¹³ *Smith v. Hughes*, L. R. 6 Q. B. 607, quoted in *Anson on Contracts*, 150. In *Stoddard v. Ham*, 129 Mass. 383, the Court says: "A party cannot escape the natural and reasonable interpretation which must be put on what he says and does, by showing that his words were used and his acts done with a different and undisclosed intention. * * * It is not the secret purpose but the expressed intention which must govern, in the absence of fraud and mutual mistake."

✓¹⁴ *Knight v. Cooley*, 34 Iowa, 221.

¹⁵ [1893] App. Cas. 552.

your title deed in order that we may get early possession." No reply was made to this. In a suit against the defendant, it was held that no contract was made, and that the last telegram was an offer and not the acceptance of an offer. In the judgment of the Court (the Judicial Committee of the Privy Council), it is only said, "The mere statement of the lowest price at which the vendor would sell contains no implied contract to sell, at that price to the persons making the inquiry."

One may say of this language that it is an allegation and not an argument; moreover the allegation, while true abstractly, was false in connection with the facts of the case. The statement of the lowest price at which the vendor would sell was made in reply to the specific inquiry by the plaintiffs, "Will you sell us," and therefore was not a statement of price generally, but a statement of the price at which the defendant would sell to the plaintiff.¹⁶

The principle that a man who makes an offer is bound by the fair construction of his words is illustrated by a case in which the defendant published the following advertisement: "£ 100 reward will be paid by the Carbolic Smoke Ball Co. to any person who contracts the increasing epidemic influenza colds, or any disease caused by taking cold, after having

¹⁶ For the reasons stated in the text it seems to me that the juridical value of the decision in *Smith v. Gowdy*, 8 Allen, 566, is open to much question. In that case, S. wrote to G.: "How many rags have you on hand and your price for them?" G. replied: "We have about a ton and our price is 3½ cents." S. answered: "We will take the rags at the price you name." It was held that this correspondence created no contract, because the Court regarded G.'s answer to the inquiry not as an offer but as an overture. The opinion in this case was written by the author of "Metcalf on Contracts". A reference to a book of Massachusetts Citations indicates that it has only once been cited in that State. This was in *Lincoln v. Erie Preserving Co.*, 132 Mass. 130, and this case is itself questionable. In *Crossett v. Carleton*, 23 N. Y. App. Div. 367, it was held that a binding contract was made when there was a direct inquiry to the defendant as to the price at which he would sell bags, a reply stating the quantity, price and terms, and a final telegram of unqualified acceptance. See also *Fairmount Glass Works v. Woodenware Co.*, 106 Ky. 659, to the same effect.

used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1,000 is deposited with the Alliance Bank Regent St. showing our sincerity in the matter." It was held that this advertisement was not a mere puff but that the plaintiff had a right to consider that it was intended to be a promise, and having performed the conditions was entitled to recover the reward.¹⁷

Performance of services. When one person renders valuable services for another with the latter's knowledge, that is ordinarily an offer intended to create a legal relation. But the circumstances under which the services were rendered and the relationship between the parties must be considered in order to determine whether the performance of the services was intended as the offer of an act for a promise, and was communicated as such. The secret intention on the part of the person doing the work to charge for it is not sufficient. In order to impose an obligation to pay upon the person receiving the benefit of the services, it must be shown that the latter assented to the proposal or ought to have known that compensation was expected.¹⁸

The relationship existing between the parties is often taken as indicating that there was no intention to pay for the services. So where a son made a claim against his mother's estate to recover compensation for his management of her affairs in her lifetime, the Court said: "If under all the circumstances of the case such services were of such a character as to lead to a reasonable belief that it was the understanding of the parties that pecuniary compensation should be paid for them, then the jury may find an implied contract. In order to justify the claim there must have been a design at the time of the rendition to charge, and an expectation on the part of the recipient to pay for the services. The services must have been of such a character, and rendered under such circumstances as fairly to imply an understanding of payment and a promise to pay. If services are rendered with expectation of compensation by will, a charge cannot after-

¹⁷ *Carlill v. Carbolic Smoke Ball Co.* [1893]. 1 Q. B. 256.

¹⁸ *Pew v. Gloucester Bank.* 130 Mass. 395.

wards be preferred against the person for them."¹⁹ When a woman lives with her brother for a number of years performing the household services but not expecting any pecuniary compensation, no liability to pay such can be inferred.²⁰

When services have been rendered for a decedent by a member of his family, then in an action against his personal representatives to recover compensation for them, the presumption is that such services were gratuitous, and the plaintiff must show that they were performed with a design on his part to charge and an expectation by the deceased to pay for the same. But if the plaintiff was not a member of the defendant's family, then the rendering of the services is *prima facie* evidence of their acceptance, and of an obligation to pay what they were worth if there be no evidence of an express contract to pay a definite sum.²¹ In order to be a member of a family in this sense, it is not necessary that there be any blood relationship between the parties. Those who live together under the same roof, in the way in which families ordinarily live, each taking part in the domestic work, are to be regarded as members of the family.²²

§ 11 (ii). **The Offer May be Communicated by Conduct or by Words, but Must be Communicated.** When a man offers his services or goods to another, a contract may be formed without the utterance of a word by either party when they are accepted under circumstances which show that the offeror intended to create a legal relation and that this intention was known or ought to have been known by the other party. The passing of a street railway car is the offer of a contract of transportation which is accepted by the passenger's board-

¹⁹ Bantz v. Bantz, 52 Md. 686. See also Bixler v. Sellman, 77 Md. 494; Duckworth v. Duckworth, 98 Md. 92; Pearre v. Smith, 110 Md. 531.

²⁰ Cone v. Cross, 72 Md. 102.

²¹ Gill v. Staylor, 93 Md. 453. In this instance, as in several other citations of recent Maryland cases in this book, I have used the language of the Syllabus in the Report. Since I wrote all the head notes in the Maryland Reports from 80 Md. to 114 Md., I am minded to rely on them.

²² Pearre v. Smith, 110 Md. 533.

ing the car. When property is put up for sale at auction, that is the asking for bids, and each bid is an offer which is accepted when the hammer falls.¹ The bidder at an auction sale often makes his bid by a mere nod of the head in response to an inquiry from the auctioneer. That nod of the head is as effective an offer as spoken words would be.²

When a man sends his goods to a person who has reason to suppose that the sender expects to be paid for them, that is the making of the offer. The principles relating to the formation of a contract under such circumstances will be considered more particularly in connection with the subject of the acceptance of an offer by conduct, or silence.

When the offer consists of an act, it must be done under such circumstances that the doing of it is known by the other party at the time to be an offer. If done without his knowledge, the offer is not communicated and the fact that he is benefited by the act, does not constitute an acceptance.³

A. built a party wall between his house and B.'s. B. neither directed the wall to be built nor promised to pay one-half of the cost. A. expected that B. would pay and B. knew it, and allowed him to proceed without objection. Under these circumstances a promise on B.'s part to pay may be inferred.⁴ Where the plaintiff as a volunteer aided in navigating the defendant's ship and then sued to recover compensation for his services, it was held that he could not recover, because the defendant did not have the power to refuse the services when they were offered. In this case Pollock C. B. said: "Suppose I clean your property without your knowledge, have I then a claim on you for payment?

¹ *Payne v. Cave*, 3 Term R. 148; *Blossom v. Railroad Co.*, 3 Wallace, 96; *Anderson v. Wisconsin C. R. Co.*, 107 Minn. 296; 20 L. R. A. (N. S.) 1133. Sale of Goods Act, art. 58, sec. 2.

² *Warehime v. Graf*, 83 Md. 98.

³ *Coleman v. U. S.*, 152 U. S. 96; *Bartholomew v. Jackson*, 20 Johnson, 28; *Thornton v. Sturgis*, 38 Mich. 641.

⁴ *Day v. Caton*, 119 Mass 513.

One cleans another's shoes, what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?"⁵

The rule in question does not mean that all the terms of the offer must be actually known by the offeree. A man may give his assent to terms when the knowledge of them is merely imputed to him, upon the general principle that notice is often equivalent to knowledge. Thus one who purchases a railway ticket is held to assent to the conditions printed upon it although he may not have read them. The ticket is not only a token that the passenger has paid his fare, but is also the contract between the carrier and the passenger.⁶ The acceptance of a bill of lading embodying the terms of the contract is in general sufficient evidence of the assent of the shipper.⁷ When a policy of insurance states that it is made upon the terms and conditions mentioned in the charter and by-laws of the insurer, the assured is presumed to have knowledge of them all.⁸

⁵ *Taylor v. Laird*, 25 L. J. Exch. 329, cited in *Anson, Contr.* 108.

⁶ *Western Md. R. Co. v. Stocksdales*, 83 Md. 255; *Mosher v. St. Louis, etc., Co.*, 127 U. S. 390; *United Rys. Co. v. Hardesty*, 94 Md. 661.

⁷ *Wolff v. Adams Express Co.*, 106 Md. 472.

⁸ *Mut. Ins. Co. v. Miller Lodge*, 58 Md. 471. In *Watkins v. Rymill* [1883], L. R. 10 Q. B. D. 178, "R. kept a repository for the sale, on commission, of carriages, etc. W. took a waggonette to the repository and left it to be sold, and was given a receipt on a printed form, which ran: "Received from ———, subject to the conditions as exhibited on the premises." The conditions referred to were printed and exhibited in many conspicuous parts of the repository. One condition specified the charges for standing room, etc.; another gave R. power to sell, without notice to the owner, any property which remained at the repository over a month, unless all expenses were previously paid. W. put the receipt into his pocket without reading it. A month later he called and was asked for the receipt, which he said he had lost, and was told that he must produce it. When he at last found the receipt and applied for the waggonette, R. had sold it for £9. 19s., 6d., and, after deducting the charges specified by the conditions, sent him the balance, 16s. 10d. W. sued R. for the value of the waggonette, contending that he was not bound by the conditions. *Held*, W. was bound by the conditions, and so had no right of action against R. For the acceptance of a carriage for sale on commission is a transaction in which special terms might reasonably be expected to exist, and R. had taken reasonable means to give notice of the conditions to W. Therefore the receipt

§ 12 (iii). **The Offer Must be Certain and Definite—Subject-Matter of the Agreement.** The object or subject-matter to which the agreement relates must be definite and ascertained, either by the offer or by reference to some extraneous thing, such as the usage of the trade or the custom of the parties. If it were not ascertained or ascertainable neither the Court nor the parties could know whether that which was done or tendered in performance of the agreement was a due performance. "If the agreement be so indefinite that it is not possible to collect from it the full intention of the parties, it is void, for neither the Court nor the jury can make an agreement for them."¹ Theoretically, the object of a contract is to create one or more obligations and the object of the obligation thus created is a certain performance to be accomplished by the promisor. Therefore, the object of the contract is in reality, distinct from the object of the obligation.² But it is natural and convenient to confound these two elements, since the ultimate object of the contract is that thing which is the object of the obligation.

Now since a contract is made by an unqualified acceptance of an offer, it follows necessarily that the offer must itself sufficiently describe the object of the obligation—the thing to be done or forborne by the promisor, or by both parties in a bilateral contract. If any uncertainty in what purports to be an offer is remedied by an apparent acceptance, then the latter is the real offer and itself requires an acceptance. In connection with this rule as to offer, we may therefore consider the general principles requiring certainty in agreements. The object of every agreement is something that one party agrees to deliver or something that

constituted an offer to receive the waggonette subject to the conditions exhibited, and W.'s act, in taking it without objection, amounted to an acceptance of that offer." Potts' Summary of the Principles of Contract, p. 95.

¹ Thomson v. Gortner, 73 Md. 474. See also Pearce v. Watts, L. R. 20 Eq. 492, where the Court could not determine the extent of the obligations where the agreement was to sell an estate reserving "the necessary land for making a railway".

² Huc, Com. vii, p. 91.

he promises to do or not to do. These objects must first of all be possible and lawful. If the promise is to do something impossible or illegal at the time when the agreement is made, the contract is void, for lack of consideration or for illegality; and it does not become valid if the thing promised afterwards becomes possible or lawful.

The thing which is the object of the agreement must be ascertained, at least by its species. So a promise to deliver *an animal*, does not become a contract by acceptance, because a fly or a flea could be tendered in performance. If you offer to rent your farm for a part of the crop, a basket of onions could be tendered in discharge of the rent. So an agreement to build a house, without stating what kind of house, or in what location, is not a contract. In other words, to promise nothing and to promise something so indefinite that a valueless or illusory performance would discharge the promise are two identical things.

This rule does not mean that the offeror must specify with entire distinctness the subject-matter. That is certain which can be made certain by reference to some extraneous matter, or to future event, or by the custom of the parties or the usage of trade. Evidence is admissible to show these circumstances. Thus while an offer to sell an animal, without saying what kind of animal is illusory, an offer to sell a cow or mule is sufficient, and will be construed to mean a merchantable animal of the particular species named. So an offer to sell the future product of a farm or vineyard or all the lambs that may be dropped by a flock of sheep in certain season is sufficient, because it can be made definite.³

Quantity. The quantity or amount of the things to be delivered under a contract may be left undetermined by the agreement itself, provided some means are thereby provided by which the quantity may be ascertained. Or if the agreement be to sell a certain quantity of land more or less, or about a certain quantity of goods, that is sufficiently definite. In such cases there may be a deficiency or excess below or above the quantity named, the extent of which is to

³ Keller v. Ybarru, 3 Cal. 147; Losecco v. Gregory, 108 La. 648.

be determined by a consideration of the subject-matter.⁴ But an offer to sell merely cotton or corn without any reference to any means of specifying the quantity is too vague.

What may be needed. An offer to deliver all that the other party may need of a certain article during a certain time is sufficiently definite, for in such case the agreement gives to the offeree the right to specify the amount. The acceptance of such an offer does not however, constitute a contract unless the buyer agrees to take from the proposer what he may need in his business, because without such promise to buy, there is no consideration for the promise to sell. Some of the cases on this subject which relate to the question whether the buyer is under an obligation by the acceptance of such an offer are considered subsequently from the point of view of consideration.⁵ Here we may digress for a moment to consider the nature and effect of agreements to sell whatever quantity of an article as may be needed by the buyer, when the question of consideration is not involved. As a general rule, such contracts are to be construed with reference to the business carried on by the buyer. He is bound to take from the seller all that he requires in that business, and the latter is bound to deliver that quantity. Whether he can order a quantity greater than was ordinarily required by him at the time the contract was made, depends upon the language of the agreement. The buyer is not entitled to order an unreasonable quantity so as to take advantage of a rising market. These statements are exemplified in the following cases.

An offer to supply defendant's steamers with coal of a designated kind for a certain year was accepted and the contract so made was held to impose the duty to deliver and accept such quantity as was ordinarily required by these

⁴ In *Moore v. U. S.*, 196 U. S. 167, there was a contract to purchase "about" 5,000 tons of coal. After receiving 4,634 tons the buyer refused to take any more. It was held that he was not entitled to do so, for the difference was too great and the quantity he had received was not "about" the quantity he had agreed to take.

⁵ See *post*, ch. ii.

steamers in the course of a year.⁶ When defendant agreed to "buy its requirements of anthracite coal" from the plaintiffs during a certain season, it was held that the defendant was bound not to purchase coal from others.⁷ When the contract provided that the defendant should buy from the plaintiff "what roll rag paper same as has been furnished during the last twelve months," at a certain price, for one year, to be taken as required, it was held that evidence was admissible to show the course of dealing between the parties and that the intention was to supply plaintiff with whatever paper he might need in his business.⁸ In November, 1898, defendant made an offer as follows: "We hereby agree to supply to the D. Company from date to January 1, 1900, all the cans they will use for packing in their factory at below mentioned prices, terms cash, etc. This agreement is made in consideration of the D. Company buying all the cans they may use from us." This offer was accepted in writing. In September, 1899, the defendants refused to supply more cans, upon the ground that the capacity of the plaintiff's factory had been increased. It was held that the contract was valid and not a mere offer, and that the defendants evidently made it, not with the understanding that the capacity of the factory should remain the same as it had been previously or that the machinery should remain the same, but with the understanding that the plaintiff might make improvements incident to an increase of business.⁹

In an action against the defendants who had agreed to supply plaintiffs with their entire "radiator needs" for the year 1899 at certain prices, the defense was that the defendant had filled all orders for the plaintiff until 48,000 feet of

⁶ *Wells v. Alexander*, 130 N. Y. 642; 17 L. R. A. 218. See also *Warden Coal Co. v. Meyer*, 98 Ill. App. 644; *Loudenback Fer. Co. v. Tenn. Fer. Co.*, 121 Fed. R. 298; 61 L. R. A. 402.

⁷ *Minn. Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85; 31 L. R. A. 529. In *Tancred Anol & Co. v. The Steel Co. of Scotland*, L. R. 15 App. Cas. 125 (1890), a contractor agreed to supply "the whole steel" required for the Frith of Forth bridge. It was held that he was entitled to supply all the steel actually used.

⁸ *Excelstor Wrapping Co. v. Messinger*, 116 Wis. 549.

⁹ *Dailey Co. v. Clark Can Co.*, 128 Mich. 591.

radiation had been delivered which was as much as plaintiff had ever required before; but that he continued to send in orders which would bring the aggregate for the year up to 100,000 feet and defendants refused to deliver these orders in excess. The Court held that no such limitation was to be imported into the contract, and that the controversy probably originated from the fact that there was a large advance in the market price of the product after the execution of the contract.¹⁰ "If the plaintiff could sell the goods ordered at a profit then it needed them, and there was no doubt about plaintiff's ability to sell the goods at a larger profit." * * * "But we do not mean to assert that the plaintiff had the right to order goods to any amount. Both parties in such a contract are bound to carry it out in a reasonable way. The obligation of good faith and fair dealing towards each other is implied in every contract of this character. Plaintiff could not use the contract for the purpose of speculating in a rising market since it would be a plain abuse of the rights conferred and something like a fraud upon the seller. It would be competent for the defendant to show that the orders were in excess of the plaintiff's reasonable needs and were not justified by the custom of the trade."

Uncertain price. It is not necessary that the offer should specify the price at which the property is to be sold, or payment made for services to be rendered, for if no price is named, a reasonable price, or the market price, is implied. When a railway company agrees to allow other roads to use its right of way, upon such fair compensation to be paid therefor as may be agreed upon, the contract is enforceable. In this case the Court said: "If the parties agree upon it, very well; but if they do not, still the right of way is to be enjoyed upon making compensation, and the only way to ascertain what is fair and equitable is to determine it by

¹⁰ N. Y. C. Iron Works Co. v. U. S. Radiator Co., 174 N. Y. 331. See Nat. Building Supply Co. v. Baltimore City, 100 Md. 188, as to an agreement to supply a city with all the cement it might require in a certain year.

a Court of equity. Such is in substance, the agreement of the parties.”¹¹ An offer by A. to sell goods to B. at as low a price as A. sells to anyone else, is not *per se* binding. But if B. gives orders under it and subsequently discovers that he has not had the benefit of that “most favored nation” clause, he is entitled to recover the difference between the price paid by him and that paid by others to whom A. gave better terms.¹²

When the agreement refers to no standard, either expressly or by implication, according to which the price can be ascertained, it is too uncertain and cannot be enforced as an executory contract, although recovery on a *quantum meruit* may be had for what was done on it. Where defendant agreed to receive certain news reports for a number of years, and to pay therefor “a sum not exceed \$300 during each and every week that said news report is received,” it was held that the contract was too indefinite as to price, and that it was operative only so long as the parties chose and were able to agree upon the price per week; and also that the payment of \$300 each week in the past for the news reports furnished was not an acknowledgment of an obligation to pay that amount during the whole contemplated life of the contract.¹³

Offer requiring act to be done by a party. The element of certainty may be supplied by an act which one of the parties agrees to perform subsequently. Thus, where the offer is to sell a given quantity of certain articles, of a

¹¹ *Joy v. St. Louis*, 138 U. S. 1.

¹² *Holtz v. Schmidt*, 59 N. Y. 255. In *Benjamin v. Bruce*, 87 Md. 240, it was held that where A. agrees to sell goods to B. for the same price at which he sells similar merchandise to anyone else, then an overcharge by A. entitles B. to demand a rebate to the extent of the excess, and the claim is for a fixed amount. But when A. merely agrees not to sell to other persons at a lower price than B. is charged, then a violation of this agreement by A. does not entitle A. to claim a definite sum, but only gives him a right of action for unliquidated damages.

¹³ *United Press v. N. Y. Press Co.*, 164 N. Y. 406. Appended to this case as reprinted in 53 L. R. A. 288 is a note collecting decisions relating to the effect on a contract of leaving the price indefinite.

style or size to be selected by the buyer, and the latter accepts the offer and agrees to specify the styles to be delivered, that is a complete contract, and if the buyer neglects or refuses to make the specifications, he is guilty of a breach of the contract.¹⁴ An agreement to sell ten acres out of a larger tract of land, without any special designation of the particular acres sold, is too uncertain.¹⁵ But when the offer gives to the purchaser a right to select the particular tract he may desire, that is sufficient.¹⁶

Uncertainty cured by conduct. In some instances, when a vague offer and acceptance have been acted upon and thus construed by the parties, the original uncertainty in the agreement is thereby removed.¹⁷ Thus in the case last mentioned, if the purchaser of an undesignated part of a large tract, enters into possession of a particular part, which is conveyed to him, that practical construction supplies the defect in the description.¹⁸ When services have been rendered or goods delivered under an agreement too indefinite to be enforced as an executory contract, there may be a recovery for the value of the benefit conferred.¹⁹

¹⁴ *Kirwan v. Roberts*, 99 Md. 341. This case in effect overrules *Wheeling Steel & Iron Co. v. Evans*, 97 Md. 305, and the latter case should be disregarded.

¹⁵ *Hanna v. Palmer*, 194 Ill. 41; *Brooks v. Halane*, 116 Ill. App. 383. A vote by managers to purchase five acres of land out of more than ten offered, and authorizing an agent to make the purchase, is not a contract when no boundaries are designated. *Madden v. Boston*, 177 Mass. 350. An agreement to convey a parcel of land 40 by 125 feet out of a certain 80-acre tract, the particular location to be mutually agreed upon at a future time, is not a contract, and money paid under it may be recovered back. *Scanlon v. Oliver*, 42 Minn. 538.

¹⁶ *Burton v. Cabanel*, 42 Minn. 267; *Brown v. Munger*, 42 Minn. 482.

¹⁷ *Old Jordan M. & M. Co. v. Société Anonyme*, 164 U. S. 261. When after the preparation of a written contract, the parties become aware that it is ambiguous and indefinite as to certain particulars, and one party writes a letter to the other stating the construction he places on the contract in this respect, after which the other party signs the contract, that amounts to an acquiescence in the construction so placed on it. *Snead & Co. v. Merchants' Loan & T. Co.*, 225 Ill. 442; 9 L. R. A. (N. S.) 1007. See also *Ala., etc., R. Co. v. South, etc., R. Co.*, 84 Ala. 570.

¹⁸ *Purinton v. R. R. Co.*, 46 Ill. 297.

¹⁹ *United Press v. N. Y. Press Co.*, 164 N. Y. 406; 53 L. R. A. 288.

Agreements of indefinite duration. It is generally held that a promise to give "permanent" or "steady" employment to a person is not too vague to constitute a contract. So an agreement to employ plaintiff as a station agent so long as he performs the duties in a thorough manner is valid.²⁰ Where defendant agreed that if plaintiff would enter his service he would give him permanent employment and certain wages, which was done for a time, but afterwards the defendant alleged that the contract was too indefinite, it was held that, considering the circumstances of the parties, this contract means that so long as the defendant was engaged in that business and had work which the plaintiff could do, and was willing to do, the defendant was bound to employ him; that according to this construction the contract was sufficiently definite.²¹ In some cases, it has been ruled that a contract for permanent employment means for an indefinite time, and may be ended by either party at his pleasure.²² Where no time was fixed for the duration of a contract to manufacture a patented article, it was held that either party could terminate it, but should give reasonable notice of his intention to do so.²³ An agreement by A. to furnish work and materials for B., so long as both parties should see fit to continue the arrangement, has been held to be terminable by either party at pleasure. The Court said: "It cannot be held to have bound the parties to continue their relations forever. It was therefore terminable by either of them at pleasure. The plaintiff, having elected to termi-

²⁰ *Daniell v. Boston & Me. R. Co.*, 184 Mass. 543. See also *Hobbs v. Bush E. L. Co.*, 75 Mich. 550.

²¹ *Carnig v. Carr*, 167 Mass. 544; 35 L. R. A. 512. A contract to give employment so long as the business of the employer continues, is valid. *McMullen v. Dickinson Co.*, 63 Minn. 405. In *Harrington v. K. C. R. Co.*, 60 Mo. App. 223, it was held that a promise to give steady employment so long as the promisee does the work properly means during life.

²² *Lord v. Goldberg*, 81 Cal. 596; *Perry v. Wheeler*, 12 Bush. 541; *Roddy v. McGetrick*, 49 Ala. 159; *Sullivan v. Detroit, etc., R. Co.*, 135 Mich. 661; 64 L. R. A. 673.

²³ *Fuel Co. v. Plumb*, 182 Pa. 464. As to the construction of a contract to pay the bills incurred for a certain purpose "for the present," see *Lewis v. Worrell*, 185 Mass. 572.

nate it, could immediately maintain an action for that which was due him.”²⁴ A contract providing that a railway company shall maintain a station for passengers at a certain place is sufficiently complied with by the construction and maintenance of a station there for a number of years. The contract does not bind the company to keep a station forever at the place.²⁵ When an employer agrees to employ a man so long as his services are satisfactory, some cases consider that the employment although at the will of the employer is not too vague and constitutes a consideration for the agreement of the employee to release the employer from a claim for damages for an injury previously suffered.²⁶ But the view of other Courts is that such a promise of employment is too uncertain to be enforced, and is therefore not a consideration.²⁷ The subject of contracts to be performed to the satisfaction of one of the parties will be considered subsequently, under the head of Conditions.

²⁴ *Quinn v. Bay State Dis. Co.*, 171 Mass. 291. In *Faulkner v. Des Moines Drug Co.*, 117 Iowa, 120, a contract by which the defendant employed the plaintiff to manage its surgical instrument department provided that it should continue until mutually agreed void. It was held that this agreement was invalid for uncertainty as to the time of employment, the Court saying: “It is not conceivable that in entering into the contract the plaintiff supposed that he was entering a service from which nothing but death or the consent of the defendant could relieve him. Equally incredible that defendant supposed it was taking into its employment a person whom it was bound to retain in its service until such time as that person should consent to his own discharge.” This ruling is in conflict with the cases cited in the notes immediately preceding and succeeding. Such a contract should be held valid and terminable either after the lapse of a reasonable time or by either party after notice.

²⁵ *Whalen v. B. & O. R. Co.*, 112 Md. 187; *Texas & P. R. Co. v. Marshall*, 136 U. S. 393; *Mobile v. People*, 132 Ill. 559.

²⁶ *Rhoades v. C. & O. R. Co.*, 49 W. Va. 494; 55 L. R. A. 170; *Forbes v. St. Louis, etc., R. Co.*, 107 Mo. App. 661. *Cf. Pierce v. Tenn. C. & I. Co.*, 173 U. S. 1.

²⁷ *M., K. & T. R. Co. v. Smith*, 98 Tex. 47; 66 L. R. A. 741; *Potter v. Detroit, etc., R. Co.*, 122 Mich. 179. See also *Ogden v. Traction Co.*, 202 Pa. 481, and *Smith v. Crum Lynne, etc., Co.*, 208 Pa. 462, where the contracts of employment were held to be too vague and indefinite for enforcement.

Indefinite offer of compensation. When one's promise to compensate the other party for his services leaves the whole matter to the arbitrary choice of the promisor, the agreement does not constitute a contract because no legal obligation is thereby created.²⁸ But if the offer is to pay such sum as the promisor may deem right, or as may be proper, it is not too vague, and means that the promisor must act in good faith or that he will pay the fair value of the services.²⁹ So while the promise to pay a *liberal reward* for the return of lost property, does not entitle the finder to a lien on the property, it requires the offerer to pay a fair sum, and if the parties cannot agree, the amount must be determined by the Court.³⁰

Examples of indefinite agreements. An agreement to work a certain mine "as long as we can make it pay" is too indefinite. It gives the promisor the right to say when a further execution of the contract will not be advantageous, because he cannot make it pay, although a better manager might be able to make it pay.³¹ Before making a contract for the manufacture of certain articles, the workman inquired whether, if he asked for something on account, it would be given him. The other party replied that he would help him. No reference to this matter was made in the written contract. It was held that there was no effective agreement to make advances, and that this language was too vague and uncertain to confer any legal right on the promisee.³²

²⁸ See *post*, Part v. ch. 1

²⁹ *Tennant v. Fawcett*, 94 Texas, 111, citing *Butler v. Winona Mill Co.*, 28 Minn. 205; *Lee's Appeal*, 53 Conn. 363, and distinguishing *Millar v. Cuddy*, 43 Mich. 273. See also *Stewart v. Marvell*, 101 N. Y. 357. In *Van Arman v. Byington*, 38 Ill. 443, the defendant employed an attorney, promising to pay him whatever he might charge. It was held that the attorney could recover only the reasonable value of his services.

³⁰ *Wilson v. Guyton*, 8 Gill, 313.

³¹ *Davie v. Lumberman's Mining Co.*, 93 Mich. 491; 24 L. R. A. 357.

³² *Blakistone v. German Bank*, 87 Md. 302. See another instance of an indefinite agreement in *Potomac Bottling Works v. Barber*, 103 Md. 509. In *Ervin v. Ervin*, 25 Ala. 236, it was held that a promise to endorse plaintiff's paper and make advances, without stating the amounts or time, was too indefinite.

Where the promise was to give £ 5 more for a horse if it proved lucky, the Court said that these words were too loose and vague to be considered in a Court of law, and that they amounted "merely to one of those honorary engagements which seem very much to prevail among persons in this way of business."³³ An agreement to sell "all that part of a tract of land called R. lying adjoining the turnpike road near where P. now lives," is too vague, since it fails to designate with sufficient certainty the particular part sold.³⁴ A contract to retire from business "so far as the law allows" is too vague to be enforced.³⁵ A promise by a man to give his niece a house, and provide for her at his death if she would live with him, is unenforceable for the same reason.³⁶ An agreement by a landlord that his tenant should "have the preference of renting the demised property as long after the expiration of the terms, as it should be rented for a store" is unenforceable.³⁷ Upon a bill for specific performance, it was held that where A. agreed to let B. retain possession of certain premises for one year upon B.'s paying the same rent, A. might be able to obtain from other parties, the promise was too uncertain.³⁸

³³ *Guthing v. Lynn*, 2 B. & Ad. 234.

³⁴ *Dorsey v. Wayman*, 6 Gill, 59. See also *Alleman v. Hammond*, 209 Ill. 70. An agreement to buy five acres out of more than ten offered, not designating the boundaries of the five, is not a contract. *Madden v. Boston*, 177 Mass. 350. Money paid under such an indefinite agreement may be recovered back. *Scanlon v. Oliver*, 42 Minn. 538.

³⁵ *Davies v. Davies*, 36 Ch. Div. 359. In *Young v. Farwell*, 146 Ill. 471, an agreement was considered too indefinite, which was to the effect that an employee should receive some compensation in addition to his fixed salary, but not stating the amount or what should be done to earn it.

³⁶ *Wale's Appeal*, 111 Pa. 430. See also as to a promise to give one a child's part, *Woods v. Evans*, 113 Ill. 186. As to a promise to give a child "a share of what I leave," see *Farina v. Fickus* [1900], 1 Ch. 331.

³⁷ *Delashmutt v. Thomas*, 45 Md. 140.

³⁸ *Gelston v. Sigmund*, 27 Md. 334. Unless the agreement for a lease fixes the duration of the term and the amount of the rent, it cannot be specifically enforced. *Myers v. Forbes*, 24 Md. 611; *Howard v. Carpenter*, 11 Md. 278. It is to be remembered that greater

Right of refusal. To give or have the refusal of property sometimes means that the proposer has promised that his offer shall remain open for acceptance during a certain length of time. In this sense a "refusal" is merely an offer and may be revoked before acceptance. But the expression is also used to indicate that a contract has been made by which the proposer is bound to keep his offer open. In this sense a refusal is often called an option. The general principles relating to options are considered subsequently in connection with other contracts dependent upon potestative conditions. Here we may look at the element of certainty required in options as in other contracts.

An agreement contained in a lease that if the lessor sells the property, the lessee shall have the right to buy it for such sum as the lessor may be able to obtain from other parties, is valid.³⁹ But an agreement by the lessor that the tenant shall have the "first chance" to buy the demised property in case it should be for sale, no price being named, is too uncertain for specific performance.⁴⁰ A., the owner of a race course, agreed that if at any time the property should be disposed of for other purposes, then B. should have the "first

certainty is required in a suit for specific performance than in an action for breach of contract. In *Schwanebeck v. Smith*, 77 Md. 320, a contract to sell a piece of ground, "charging therefor the market price for said ground as it shall appear on the date of said sale," was held to be too uncertain for specific performance. The Court said: "The market price of property being what it will bring in fair open market at public sale, it is not practicable to ascertain that price unless the property be subjected to the test of such sale, and that is clearly not what was contemplated by the parties. And to determine the matter upon the mere opinions of witnesses that might be produced by the opposing parties, would not conform to the terms of the contract and might work surprise to either or both of the parties. Indeed, to determine the question on such evidence would simply be to make it depend upon the opinions of valuers, with respect to whose opinions the parties might not have been willing to contract; for, as was said by Lord Alvanley in *Emery v. Wase*, 5 Ves. 848, 'valuers differ so much that is not very wise to agree to sell according to the valuation of any one.'"

³⁹ *Hayes v. O'Brien*, 149 Ill. 403; 23 L. R. A. 555. But see *Martens v. Reilly*, 109 Wis. 477.

⁴⁰ *Folsom v. Harr*, 218 Ill. 309.

refusal" thereof. It was held that first refusal imported either a reasonable offer to sell to B., or that the price at which A. was to give B. the first refusal was a price which A. would accept from other would-be buyers in the event of the refusal of B. to buy at that price; *i. e.*, that B. had a right of pre-emption, and that an offer to B. at an extravagant price, which A. did not reasonably expect would be given by any buyer, was not giving a first refusal within the meaning of the clause. It was also held that B. was entitled to enforce his right as against A. and an intending purchaser, upon the ground that the contract to give B. the first refusal involved a negative agreement not to part with the property without giving to B. that first refusal.⁴¹

§ 13 (iv). **The Offer May Lapse or be Revoked Before Acceptance.** Since an offer is the act of the proposer alone, it can in itself confer no rights upon the person to whom it is addressed. His rights are created exclusively by his acceptance, but that acceptance has no effect unless it be of an offer then in force. An offer ceases to be outstanding and open for acceptance if it has expired by lapse of time, or if it has been withdrawn, or if the party making it has died, or if it has once been rejected by the offeree. When parties are dealing face to face, an offer must ordinarily be accepted on the spot. But it frequently happens that the proposer says, either expressly or impliedly, "you may have time to consider this offer," or "you may have until a certain hour or day in which to accept." And in contracts by correspondence, where the transaction is *inter absentes*, there is necessarily a certain time during which the offer remains open. The question then is, what is the life of an offer, how long does it remain open for acceptance?

When the proposer specifies a definite time during which his offer may be accepted it lapses and comes to an end at

⁴¹ Manchester Ship Canal Co. *v.* Manchester Race Course Co. [1901], 2 Ch. 37.

the expiration of that time; it cannot be accepted afterwards.¹

If no time is specified in the offer, it must be accepted within a reasonable time.² What is a reasonable time depends upon the circumstances of the case and is a question of law for the Court. Five days is not unreasonable when the sale of valuable real estate is concerned.³ But when the offer relates to the sale of goods, the market for which is subject to fluctuation, a delay of twenty-four hours in dispatching an acceptance is too great.⁴ If a reply is asked for by return mail, a later acceptance is ineffective.⁵ In such case however, an acceptance posted on the day of the receipt of the offer, but not by the very next mail is in time.⁶ B.'s offer to sell goods on certain terms, stated that, "we are to have an immediate wire routing." The telegram containing this offer was sent on the evening of October 1st, and delivered to A. in Chicago early on the morning of October 2nd. A. did not reply until after 6 o'clock P. M. on October 2nd, when he sent a night message, which was not delivered to B. until the morning of October 3rd. The time required for the transmission of a telegram from A. to B. during the day was about one hour. It was held that B.'s offer required

¹ *Richardson v. Hardwick*, 106 U. S. 252; *Page v. Shainevald*, 169 N. Y. 246; 57 L. R. A. 173; *Weaver v. Burr*, 31 W. Va. 736; 3 L. R. A. 94.

² *Ryan v. U. S.*, 136 U. S. 61; *Burton v. U. S.*, 202 U. S. 344; *Maclay v. Harvey*, 90 Ill. 525; *Ferrier v. Storer*, 63 Iowa, 484.

³ *Kempner v. Cohn*, 47 Ark. 510. When a broker empowered to sell a farm becomes the procuring cause of a sale made five months after his authority was given, that offer to him will not be held, as matter of law, to have lapsed by efflux of time, so that his acceptance by performing the services contemplated comes too late to make a contract entitling him to commissions. *Slagle v. Russell*, 114 Md. 420.

⁴ *Minn. Oil Co. v. Collier Co.*, 4 Dillon, 431. See also that the offer of articles of fluctuating value must be accepted promptly. *Hill v. Mathews*, 78 Mich. 377.

⁵ *Carr v. Duval*, 14 Peters, 83; *Palmer v. Ins. Co.*, 84 N. Y. 63; *Maclay v. Harvey*, 90 Ill. 525; *Bernard v. Torrance*, 5 G. & J. 383. If the offer demands a reply by telegraph, an acceptance by letter is too late, since that extends the time. *Horne v. Niver*, 168 Mass. 4.

⁶ *Dunlop v. Higgins*, 1 H. L. C. 381.

a prompt acceptance and that the delay of nearly a whole day caused it to lapse and that no contract was made by the dispatch of the acceptance on the evening of October 2nd.⁷

Death of either party. Since a contract implies the agreement of two persons, the death of the proposer causes his offer to lapse as there can be no agreement between a living and a dead man.⁸ The offer cannot be accepted by the offeree so as to bind the estate of the offeror. When A. offers to guarantee the payment of goods to be sold by B. to C. the death of A. before a sale is made, revokes the offer.⁹ The death of the person to whom the offer is made likewise causes it to lapse. The offer is made personally to him and it cannot be accepted by his representatives.¹⁰

The insanity of the offeror before acceptance also causes the offer to lapse.¹¹

Revocation of offer. At any time before acceptance has turned the offer into a contract, the proposer may revoke it. And he has this right although he may have expressly promised or stated that the offer would remain open for accept-

⁷ Van Camp Co. v. Smith, 101 Md. 565. It was held in Robeson v. Pels, 202 Pa. 399, that evidence is admissible to show that in dealings with England by cablegram an answer must be sent within twenty-four hours.

⁸ Twenty-third St. Church v. Cornwell, 117 N. Y. 601; 6 L. R. A. 807; Pratt v. Trustees, 93 Ill. 478; Wallace v. Townsend, 43 Ohio, 537. In Busher v. N. Y. Life Ins. Co., 72 N. H. 551, A. applied for insurance on his life to an agent who forwarded the application to the company. After a policy was written and sent to the agent but before it was delivered, A. died. It was held that the death of A., the offeror, before communication of the acceptance, prevented the formation of a contract.

⁹ Kernochan v. Murray, 111 N. Y. 306; Jordan v. Dobbins, 122 Mass. 168; Drew v. Nunn, L. R. 4 Q. B. D. 661.

¹⁰ Duff's Executors Case, L. R. 32 Ch. D. 301. In Sutherland v. Parkins, 75 Ill. 339, there was a writing signed by A. alone, offering to sell certain land to B., which stated: "The above proposition will be accepted by me at any time during one year from date, but no longer." B. Died a month after the date of this offer, and it was held that it could not be accepted by his heirs.

¹¹ Beach v. Trustees M. E. Church, 96 Ill. 177; The Palo Alto, 2 Ware, 343. Insanity avoids a promise to marry. Cannon v. Smalley, L. R. 10 P. D. 80.

ance until a certain time.¹² The reason for this rule is that there is no consideration for his promise to keep the offer open and being the act of the proposer alone, it is entirely within his control. And so a continuing guarantee may be revoked at any time before advances have been made on the faith of it.¹³ A written offer may be revoked orally.¹⁴

In order to effect a revocation however, when a time for acceptance has been designated or is implied, it is essential that notice of the withdrawal be communicated to the other party before his acceptance. This is so because when a man has expressed his purpose by making an offer and has said that that offer would remain open for a certain length of time, the offeree is entitled to regard that purpose as unchanged until a change is communicated. And an acceptance of the offer within the time limited and before actual communication or knowledge of a revocation completes the contract although the offeror may have intended to withdraw the offer.¹⁵

It was supposed at one time that actual notice of a revocation of the offer was not essential, even when a time for acceptance had been limited. Thus in *Cooke v. Oxley*,¹⁶ A. offered to sell certain hogsheads of tobacco to B. and agreed that B. should have until 4 o'clock of that day in which to

¹² *Bosshardt Co. v. Crescent Co.*, 171 Pa. 109; *Wilson v. Stump*, 103 Cal. 255. *In re London and Northern Bank* [1900]. 1 Ch. 220; *Corcoran v. White*, 117 Ill. 118; *Stitt v. Huidekoper*, 17 Wallace, 384.

¹³ *Re Crace* [1902]. 1 Ch. 733.

¹⁴ *Truman's Case* [1894], 3 Ch. 272. An offer must be thus interpreted: I propose such a bargain and you shall have a certain time in which to accept; nevertheless, this offer will fall if, before your acceptance, I revoke it, or if I die, or if I become insane.

¹⁵ *Patrick v. Bowman*, 149 U. S. 411; *Larmon v. Jordan*, 56 Ill. 204; *Wheat v. Cross*, 31 Md. 99. In *Byrne v. Van Tienhoven*, L. R. 5 C. P. D. 344, Lindley, J., said that "both legal principle and practical convenience require that a person who has accepted an offer, not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties." Also that, "a state of mind not notified cannot be regarded in dealings between man and man, and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all."

¹⁶ 3 Term Rep. 653.

accept. B. accepted the proposal and notified A. within the time limited, but the latter refused to fulfill the agreement. In an action against A. there was a judgment in favor of B. and a motion in arrest "on the ground that there was no consideration for the defendant's promise," which was granted. Attempts have been made to support this decision on the ground that it decided merely a question of pleading.¹⁷ But the case is to be wholly disregarded as having been either wrongly decided or imperfectly reported. It is universally held now that although the offer may be revoked before acceptance, yet if it is not retracted, "it is in force as a continuing offer until the time for accepting or rejecting it has arrived."¹⁸

Binding options. If you wish to make sure of being able at some future time to find the offer now made to you still in force, so that you may then accept it, it is necessary to make an independent agreement with the proposer not to revoke his offer. This is a distinct matter and that agreement must be supported by a consideration, or be under seal. Such a contract is commonly called an option. In consideration of a certain sum paid, or other executed consideration, the proposer agrees that you may have a certain time in which to accept his offer. That is an unilateral contract binding on him and leaving you free to accept or not within the time specified. If you do accept, then the unilateral contract is converted into a bilateral contract. The unilateral contract is subject to a condition making it enforceable at the option of the promisee. These agreements are treated subsequently under the head of conditional contracts.

¹⁷ In the second edition of his work on Contracts, Sir F. Pollock referred to Benjamin on Sales "for a conclusive answer to criticisms which have been made upon *Cooke v. Oxley*." In his fourth edition (p. 24) this reference was omitted, and he said that, "it is far from clear what the Court really meant to decide in that case, and it has been the subject of much criticism." In his seventh edition he says (p. 26): "I now agree with Prof. Langdell that it (*Cooke v. Oxley*) cannot be supported in any sense."

¹⁸ *Stevenson v. McLean*, L. R. 5 Q. B. D. 351. See also *Henthorn v. Fraser* [1892], 2 Ch. 27; *Averill v. Hedge*, 12 Conn. 424; *R. R. Co. v. Bartlett*, 3 Cushing, 224.

Revocation of offer by sale of subject-matter. When the offer is to sell certain specified property and it is declared to be open for acceptance till a designated time, the sale of that property by the offeror to a third party, of which sale the offeree has knowledge, operates as a revocation of the offer, although the proposer did not expressly communicate his revocation. The offer cannot be accepted, although within the time limited, after such knowledge. The sale and the knowledge of it by the offeree operates as an implied revocation. In *Coleman v. Applegarth*,¹⁹ defendant agreed in writing for a consideration to give plaintiff a right to purchase certain real estate before November 1st. Prior to that date, defendant orally and without consideration, agreed to extend the time to December 1st. On November 9th, defendant sold the property to a third party, of which sale plaintiff had knowledge, and afterwards, before December 1st, plaintiff tendered the amount of the purchase money and demanded a deed. On a bill for specific performance against the vendor and the third party, it was held that the agreement for the extension of time, being without consideration, was a mere offer to sell which might be revoked at any time, and that ant, was a revocation. This case is similar to *Dickinson v. Tiffany* had knowledge, although not communicated by the defendant, was a revocation. This case is similar to *Dickinson v. Dodds*,²⁰ and was decided upon its authority.

If in such a case, the offeree did not know of the prior sale when he accepted the offer, then a contract would be made, and the vendor, on account of his neglect to give notice of the revocation of his offer, would be bound by contract to sell the house to two different persons. One of them would be entitled to specific performance and the other to damages for breach of the contract.²¹

¹⁹ 68 Md. 21.

²⁰ L. R. 2 Ch. D. 463.

²¹ See Pollock on Contracts, pp. 31, 32. When the owner of land has given to one party a valid option to purchase it, another party to whom the owner subsequently agrees to sell the same land is not entitled to maintain a bill for a specific performance of his contract, although it was made before the first party declared his purpose to exercise the option. *Thistle Mills Co. v. Bone*, 92 Md. 47.

Implied revocation of offer by conduct. If the offeror says that he will receive an acceptance at a certain time and place in the future, but fails to keep his appointment to be there, no contract is formed by the appearance then and there of the offeree, ready and willing to accept the offer. In such case, the acceptance has not been communicated according to the terms of the offer, which the proposer had the right to prescribe. His promise to be at the place was not binding, and his failure to appear should be treated as an implied revocation of the offer. His absence is such conduct as clearly indicates a change of purpose.

Defendant, the owner of land, wrote a letter to the plaintiff saying that if the latter would appear at a certain time and place with the price in cash, he would receive a deed of the property. The plaintiff appeared there with the money, prepared to demand the deed, but the defendant was not present. Plaintiff then filed a bill for specific performance and obtained a decree in the Court below which was reversed on appeal. This decision seems to be put on the ground that since the plaintiff was not bound to buy the contract was lacking in mutuality.²² But it would seem that there was no contract at all but only an offer which had been impliedly revoked.

Revocation of offer of promise for an act—Broker's employment. When the offer contemplates an acceptance by the doing of an act, the contract is formed, not by a promise to

²² Levin v. Dietz, 194 N. Y. 376; 20 L. R. A. (N. S.) 251. But in Omer v. Farlow, 46 Ill. App. 122, a different ruling was made. There a man offered to sell cattle on specified terms and promised to be at a certain place in the afternoon to receive an answer. . Meanwhile he sold the cattle for a better price and kept away from the appointed place. The offeree came there ready to accept, and the next day signified his acceptance before an express notice of withdrawal had been given to him. It was held that this acceptance created a contract. For the reasons stated in the text it seems to me that where a man fails to keep such an appointment, that conduct is adequate notice of a change of purpose on his part. Since no contract had been made, the principle hereafter stated concerning the liability of a party who prevents the fulfilment of a condition where there has been a conditional contract does not apply.

do that act, but by actually doing it. Consequently the offer is revocable at any time before the act is done, provided notice of the revocation has been communicated.²³ So the offer of a reward for the return of a lost article may be revoked before performance.²⁴ If the offer was made by a public advertisement it may be revoked by another advertisement, and no subsequent performance of the services by a party who did not know of the published revocation is sufficient to constitute a contract.²⁵

When a real estate broker is asked to obtain a purchaser for property, the transaction is commonly called a contract of employment. It is, however, essentially the offer of a promise for an act, and no contract is made until the act is performed, that is, until the broker procures a purchaser who is willing and able to buy upon the terms fixed by the offeror.²⁶ That the transaction is really the offer of a promise for services to be rendered is shown conclusively by the fact that the authority of the broker, which is the same thing as the offer to him, may be revoked at any time. And also by the circumstance that the owner has no right of action against the broker for his failure to make any effort to find a purchaser, and further by the fact that frequently two or more brokers are authorized to sell the same property. The offer to a broker cannot be revoked so as to deprive him of commissions after negotiations are begun, and a purchaser procured by him, which afterwards result in a sale.²⁷

²³ *Quick v. Wheeler*, 78 N. Y. 300. After an offer has been accepted by delivering some of the goods ordered, it cannot be revoked. *Ibid.*

²⁴ *Jauvrin v. Exeter*, 48 N. H. 83; *Biggers v. Owen*, 79 Ga. 658.

²⁵ *Shuey v. U. S.*, 92 U. S. 72.

²⁶ *Cadigan v. Crabtree*, 179 Mass. 474; *Walker v. Baldwin*, 106 Md. 619; *Martien v. Baltimore City*, 109 Md. 260.

²⁷ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378; *Zeimer v. Antisell*, 75 Cal. 509. After the owner has rejected the offer procured by the broker and revoked his authority, the owner may change his mind and sell or lease to the person originally procured by the broker, and the latter is not entitled to commissions, if the owner acted in good faith and not for the purpose of escaping the payment of commissions. *Cadigan v. Crabtree*, 186 Mass. 7; *Sibbold v. Bethlehem Co.*, 83 N. Y. 378; *Livezy v. Miller*, 61 Md. 337.

The employment of a broker may of course be made in such a manner as to constitute a contract as distinguished from an offer, especially when the exclusive authority to sell is given to him.²⁸

§ 14 (v). **An Offer is Terminated by Its Rejection.** If the person to whom an offer is made rejects it, that puts an end to the life of the offer, and he cannot afterwards change his mind and accept it.¹ An offer is rejected not only when the refusal is express but also when the offeree in reply to it proposes different terms. That is an implied rejection and the offeree's proposal is a counter offer. But asking for information as to the meaning or extent of the offer is neither an acceptance nor a rejection. A. offered to sell an estate to B. for £ 1,000. B. replied offering £ 950 which was refused by A. Then B. said that he would give the £ 1,000 originally asked. It was held that no contract was made.²

A rolling mill company on December 8th, wrote to a railway company, offering to sell from two thousand to five thousand tons of rails on certain terms, adding that if the offer was accepted the offeror would expect to be notified prior to December 20th. On December 16th, the railway company, referring to the offer, ordered from the rolling mill twelve hundred tons, which order was rejected, and then, on December 19th, the railway company ordered two thousand tons" as per your letter of the eighth." This order was also refused and the railway company sued as for a breach of contract. It was held that since the offer was to sell from two thousand to five thousand tons, the railway company's order of December 16th for twelve hundred

²⁸ *Hoskins v. Fogg*, 60 N. H. 402. It was held in *Ingold v. Symonds*, 125 Iowa, 83. and *Dole v. Sherwood*, 41 Minn. 535, 5 L. R. A. 720, that where the contract gives the broker exclusive authority to sell within a certain time, but does not provide that the owner shall not himself make a sale, then upon a sale by the owner the broker is not entitled to commissions.

¹ *First Nat. Bank v. Clark*, 61 Md. 407; *Anglo-Am. Co. v. Prentiss*, 157 Ill. 506.

² *Hyde v. Wrench*, 3 Beav. 334.

tons was in law a rejection of the offer, and that the negotiations between the parties then closed and the railway company could not afterwards accept the offer.³ The Court said: "So long as the offer has neither been accepted nor rejected, the negotiation remains open and imposes no obligation on either party. The one may decline to accept and the other may withdraw his offer, and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept or an acceptance upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation unless the party who made the original offer renews it or assents to the modification suggested. The other party having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it."

This rule is not applicable unless the answer of the offeree is really a counter offer or a refusal. A simple inquiry as to whether the offeror would modify the terms of his offer is not a rejection.⁴ In *Turner v. McCormick*,⁵ the Court said that its review of the authorities seemed to established the following propositions: 1. A request for a change or modification of a proposed contract, made before an acceptance thereof, amounts to a rejection of it. 2. A mere *inquiry* as to whether the proposer will alter or modify its terms, made before acceptance or rejection, does not amount to a rejection, and, if the offer be not withdrawn before acceptance made within a reasonable time, the offer becomes a binding contract. 3. A request suggestion or proposal of alteration or modification, made after unconditional acceptance and not assented to by the opposite party does not affect the contract put in force and effect by the acceptance nor amount to a breach thereof, giving the right of rescission. 4. Acceptance of a formal option on land, converts it into a bilateral contract of sale, although accompanied by a request for a change as to the time and place of performance.

³ *Minn., etc., R. Co. v. Columbus Rolling Mill*, 119 U. S. 149.

⁴ *Stevenson v. McLean* L. R., 5 Q. B. D. 346.

⁵ *Turner v. McCormick*, 56 W. Va. 173; 67 L. R. A. 859.

§ 15 (vi). **The Acceptance Must be Communicated Unless Communication be Dispensed With.** No contract is formed unless the fact that the parties have come to an agreement passes beyond the stage of a mental undisclosed purpose and has received some external manifestation. In the case of the offer, that manifestation must be known to the other party before anything he says or does can be treated as an acceptance. But whether the actual communication of the acceptance to the offeror is necessary to complete the contract, depends upon the character of the offer. The proposer has the right to dispense with the communication to him and may expressly or impliedly agree that some other manifestation of the offeree's assent may take its place. Thus in the case of a contract made by correspondence, the offer is accepted as soon as the letter of acceptance is posted and the offeror is bound long before he has knowledge of the acceptance. When the offer is of a promise with a request for a counter promise, then the acceptance of the offer can only be made by making the counter promise. The doing of the act to which the counter promise relates, is not sufficient.¹

If a counter promise be not expressly asked for, still if it is necessary to complete the agreement, it must be communicated. Mere failure to make any reply to the offer is not sufficient. When a man writes to an insurance company asking it to renew a policy for a few days to which no answer is made, there is no contract.² An insurance company which had been doing business for the plaintiff, wrote him that it would renew the existing insurance for another year, unless notified to the contrary. Plaintiff gave no notice, and it was held that no contract had been made, because communication of the acceptance was necessary.³ An uncle wrote to his nephew offering £ 30, 15 s. for a horse, and added: "If I hear no more about him, I will consider the horse mine at that price." The nephew made no reply but told an auctioneer who was selling his horses, to keep this particular

¹ *White v. Corliss*, 46 N. Y. 467; *Russell v. Thornton*, 4 H. & N. 788.

² *Royal Ins. Co. v. Beatty*, 119 Pa. 6.

³ *Prescott v. Jones*, 69 N. H. 365.

horse out of the sale, as he had disposed of it. The auctioneer sold the horse by mistake and the uncle brought an action against him. It was held that he was not entitled to recover, the Court saying: "It is clear that the uncle had no right to impose upon the nephew the sale of this horse for £ 30, 15 s. unless he chose to comply with the condition of writing to repudiate the offer. * * * It is clear that the nephew in his own mind intended his uncle to have the horse at the price which he (the uncle) had named but he had not communicated such his intention to the uncle, or done anything to bind himself. Nothing therefore, had been done to vest the property in the horse in the plaintiff, down to the 25th February, when the horse was sold by the defendant."⁴

It will be seen in the next section that silence sometimes operates as an acceptance of an offer in connection with circumstances imposing a duty on the offeree to speak. But that duty cannot be imposed by the will of the offeror alone. Failure to say "no" is not an acceptance. One must say "yes" although, as will there be seen, one may say "yes" by implication.

But when a fair construction of the offer authorizes its acceptance by the doing of an act, then no communication of the acceptance is necessary, and the contract is complete by the performance of the services requested.⁵ If you write to your shoemaker telling him to make a pair of shoes for you, like the last pair he made, you do not expect him to sit down and write you a note, saying that he accepts your offer. You contemplate the making of the shoes as the acceptance. So in the case of public offers of reward for the return of lost property, the actual return is at once the acceptance of the offer, and the performance of the consideration. "If the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act upon the proposal

⁴ *Felthouse v. Bindley*, 11 C. B. N. S. 869.

⁵ When the promisor has had the benefit of the consideration for which he asked, it is no defense to say that the promisee was not bound by contract to do the act. *White v. Baxter*, 71 N. Y. 254; *Equit. Endow. Ass'n. v. Fisher*, 71 Md. 430.

without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification."⁶

When one promises to pay a claim against a certain debtor if the creditor will not institute suit against him, the forbearance of the creditor is an acceptance. It is not necessary that the creditor should accept by promising to forbear for a definite time.⁷ In the case of a guarantee of the debts that A. may incur, absolute in terms, it is held in some cases that the acceptance consists in giving credit to A. on the faith of the guarantee and that no notice of acceptance is necessary.⁸ In other cases, however, it has been held that notice of the acceptance of the guarantee by giving credit, must be communicated within a reasonable time.⁹

⁶ Bowen, L. J., in *Carlill v. Carbolic Smoke Ball Co.* [1892], 2 Q. B. D. 489. Giorgi says (*op. cit.*), iii, no. 213, that the acceptance need not be communicated unless it contains a counter promise. Those reasons which render necessary the communication of the offer do not exist in the case of the acceptance. He who makes a promise and communicates it to the promisee knows very well that he will be bound whenever the latter chooses to accept, and until he becomes certain that the acceptance will be lacking he is bound to the offeree in obedience to the principles of good faith and the *promissi fides*. The reason why an acceptance is required to make complete the juridical idea of a contract is no doubt the same as that on account of which a promise not accepted (*nuda pollicitatio*) remains without legal effect. Or, to use other words, the same reason by which a contract, even if unilateral, demands the concurrence of two wills. That is to say, the impossibility of one's becoming a debtor by his own act alone without the concurrence of another who is to be the creditor, because nobody is compelled to accept a promise, and if the acceptance is lacking there is also lacking a creditor. All this is reduced simply to the necessity of there being an acceptance and that it be manifested, so that there may be a certainty of its existence, but it is not necessary that it should always be made known to the proposer in order to create a contract. When one orders goods from another, the contract is made by sending them. No express acceptance in words is necessary. *Taylor v. Jones*, L. R. 1 C. P. D. 87.

⁷ Bowen *v. Tipton*, 64 Md. 275. But see *Manter v. Churchill*, 127 Mass. 1.

⁸ *Mitchell v. McCleary*, 42 Md. 374; *Boyd v. Snyder*, 49 Md. 325; *L. & W. R. Co. v. Dillard*, 51 La. 1484.

⁹ *Davis v. Wells*, 104 U. S. 524; *Davis Machine Co. v. Richards*, 115 U. S. 524; *Bishop v. Eaton*, 161 Mass. 496. In the last-named case

§ 16 (vii). **The Acceptance May be by Conduct or Silence.**

Just as the offer may be communicated by conduct without the utterance of a word, as previously explained, so also the acceptance may be made in the same tacit way. A gesture of assent, a nod of the head has always been deemed a sufficient expression of one's purpose. Agreements made by conduct alone are called in our law, implied contracts. But that is an ambiguous expression, because it is also used to designate obligations *quasi ex contractu*, when there is no real agreement of the parties as the foundation of the obligation.

When a man, without any request, sends you goods which you use knowing that he expects payment for them, that use is an acceptance of the offer.¹ So if without expressing your dissent, you will allow a man to do work for you, an acceptance of his offer is implied from your silence, because under the circumstances there is a duty to speak.² If the offer is to sell you a horse, your taking it away without a word, is an acceptance.

When a creditor did not himself sign a written agreement sent to him signed by the debtor, providing for an extension of time of payment but acted on it until his death, that conduct amounts to an acceptance.³ So it is said in the

the Court said: "If the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. * * * so that the promisor may know that a contract has been made." Many decisions relating to the necessity of notice of acceptance to bind a guarantor are collected in a note appended to *Deering & Co. v. Mortell*, 16 L. R. A. (N. S.) 353.

¹ *Hart v. Mills*, 15 M. & W. 87; *Yale v. Curtis*, 151 N. Y. 598; *Hobbs v. Massasoit Whip Co.*, 158 Mass. 194.

² *Huck v. Flentze*, 80 Ill. 258; *Day v. Caton*, 119 Mass. 513; *Coleman v. U. S.*, 152 U. S. 96.

³ *Harts v. Emery*, 184 Ill. 560. See also *Sellers v. Greer*, 172 Ill. 549; 40 L. R. A. 589. An instrument by which a company agrees to pay certain commission to an agent for one year constitutes a contract, although the agent does not expressly agree to render the services, because the intention of the parties is manifest that there should be a correlative obligation on the part of the agent. *Travellers Ins. Co. v. Parker*, 92 Md. 22.

Pandects: "A man who accepts interest from his debtor in advance, is held to make a tacit pact that he will not sue for the principal before the time by which the interest would have been payable."⁴ The acceptance of a benefit arising from the act of another, although not requested, often operates to create a contract by way of estoppel and acquiescence. So if an unauthorized agent orders goods to be sent to a man his making use of them is an acceptance.⁵ The promoter of a corporation employed the plaintiff to procure a loan on the property of the future corporation, promising to pay him a certain compensation for such services. After its formation, the corporation accepted the loan so procured and executed a mortgage to pay it. It was held that the plaintiff was entitled to recover from the corporation a reasonable compensation for his services not exceeding the sum mentioned in his agreement with the promoter.⁶

It is to be remarked, however, that after a contract is once made, no statement by one party can operate to modify it merely because the other party remains silent.⁷ After a dyer had done the work for which he was employed, he presented a bill for it on which was printed this notice: "All claims for deficiency or damage must be made within three days from date, otherwise not allowed." It was held that such statement was in no manner binding on the other party.⁸

When does silence give consent. The cases just cited show that sometimes failure to say "no" to an offer, justifies

⁴ Dig. 2, 14, 57.

⁵ Long Bill Lumber Co. v. Nyman, 145 Mich. 477.

⁶ Apartment Hotel Co. v. Glenn, 108 Md. 377. See also Sullivan v. Detroit, etc., Ry. Co., 135 Mich. 661; 64 L. R. A. 673.

⁷ A landowner granted a right of way to a railway company in consideration of the company's promise to give him a pass over the road for his life. The company sent him a pass on which it was stated that the holder should have no claim against the company for any personal injuries. It was held that there was no consideration for such release, and that the acceptance of the pass was not an assent to the terms printed on it. Dow v. Syracuse, etc., Ry. Co., 81 N. Y. App. Div. 362.

⁸ Dale v. See, 51 N. J. L. 378; 5 L. R. A. 583.

the implication of assent and that sometimes it does not. Silence is in reality ambiguous. While it is not saying "yes," still it is not saying "no". The legal effect to be attributed to it must depend upon the circumstances of each case.⁹ It may be said that, as a general rule, the silence of the person to whom an offer is made cannot be considered as a tacit assent. But when the circumstances under which the offer is made, or the relations between the parties, impose upon him a duty to speak, then his silence is to be regarded as giving consent. The efficacy of a tacit consent is founded upon the doctrine of contradiction. Consent is inferred because dissent would be in contradiction with the facts. Principles of logic rather than rules of law are what oblige us to recognize the force of silent consent. The circumstances which are in conflict with the notion of dissent may be either some positive act, affirmative in character, or silence or omission, negative in character.¹⁰ There is an affirmative act for instance, when a lender gives back the thing pledged to the borrower which act is inconsistent with the idea that he intended to retain the lien.¹¹ When a tenant holds over, that is a renewal of the lease because inconsistent with anything else.

Keeping silent, when it was necessary and possible for a man to express his dissent, is in contradiction with the idea that he did really dissent. He who is silent when he could speak and ought to have spoken, will be held to have consented. If there is no obligation to speak, silence is not incompatible with the purpose to dissent. The important thing is to determine when there is a duty to speak. This is a question of fact. The obligation to speak cannot be imposed by the mere will of the offeror, but must be founded on usage

⁹ There are consequently two contradictory maxims on the subject. In Dig. 50, 17, 142 (*de diversis regulis juris*), Paulus says: *Qui tacet, non utique faletur; sed tamen verum est eum non negare*. And the text of the canon law is: *Qui tacet consentire videtur*. Cap. 43 in vi, *de reg. juris*.

¹⁰ Giorgi (*op. cit.*), iii. no. 187.

¹¹ Dig. 2, 14, 2, where it is said: "*Si debitori meo reddiderim cautionem, videtur inter nos convenisse ne peterem.*"

or on the presumed consent of the acceptor or in the nature of the transaction.¹²

Inter praesentes. There is no obligation to reply to a question or offer unless it be the offer of an act then performed. A refusal to answer a question may not be courteous but does not create a contract. If however your silence is fairly interpreted by the offeror as giving consent to his doing some act which benefits you, such as doing work for you in your presence, silence is equivalent to express consent. Under special circumstances, one's silence may estop him to set up a claim against third parties. Thus, it has been held, not always with obvious justice, that if a man stands by silent when someone undertakes to sell his property, he may be estopped as against the purchaser.¹³

Inter absentes. What is the effect of silence after receipt of a letter making an offer, or of goods sent to one, as an offer or on approval, etc.? Certainly, as a general rule, silence is not consent or acceptance, but the contrary. The offeror has no right to impose the duty of making a reply upon the person addressed. A shopkeeper, for instance, on his own initiative sends an article to a person asking him to remit the price if it suits, or if not, to return it. This imposes no duty upon the person receiving it to take any action, and his silence is not an acceptance. He did not call for the offer and there is nothing in the previous relations of the parties to oblige him to answer. The thing sent by the maker of the offer may be reclaimed by him, but unless the person to whom it was sent makes use of it, he is not responsible for accidental injuries to it nor for its loss or destruction. Obligations which arise from a *depositum* presuppose

¹² Giorgi (*op. cit.*), iii, no. 189.

¹³ Pickard v. Sears, 6 Ad. & E. 469; Ogilvie v. West Australia [1896], Ap. C. 257; Smith v. Hutchinson, 108 Ill. 662; Jones on Mortgages, § 734. Compare: Morgan v. Chicago A. R. Co., 96 U. S. 716; Schaidt v. Blaul, 66 Md. 148. Giorgi says (iii, no. 190), that a person is not bound under such circumstances unless he is actually called upon to speak and is only estopped if his silence, after being interpellated, induced the third party to act. This would seem to be the true doctrine.

that the bailee consented to the formation of the agreement, and in the case supposed there is certainly not an involuntary deposit as that term is understood in the law of bailments. Therefore the sender must himself take the article away, and the person who received it is not required to advance the smallest sum for that purpose or to lend any aid.¹⁴

When the publisher of a newspaper or periodical notifies a subscriber that his subscription will be considered renewed if not refused, and continues to send the publication, such act is not an extension of the contract of original subscription, merely because the other party does not declare his dissent. It is not even necessary for the person to whom such publications are sent to refuse to take them from the postman. He is only liable if he makes use of them.¹⁵

When one sends a MS. to a publisher, the latter is bound to take care of it for a reasonable time, because his business constitutes a permanent offer, or rather a asking of offers from the public; and he should notify the sender of his refusal. This rule is not applicable when a newspaper or magazine gives notice that the MSS. not accepted will not be returned.¹⁶

Some of the instances in which silence or inaction of the offeree is equivalent to assent fall into the following categories:

(a) Cases where the presumption of acceptance arises from the nature of the transaction, as when the offer consists of an unilateral promise binding only on the offeror, and

¹⁴ Valery, *Des Contrats pur Correspondance*, pp. 218 *et seq.*; Giorgi (*op. cit.*), iii, n. 191. The former cites the decision of a Court which ruled that it was not permissible for any of the public to bind a third person by spontaneously sending him merchandise or to impose on him the obligation of sending it back or of writing to signify his refusal, under pain of being bound by a bargain in which the sender took the initiative and himself alone fixed the conditions.

¹⁵ *Shoemaker v. Roberts*, 103 Iowa, 683; *Fogg v. Portsmouth Athenæum*, 44 N. H. 115 (both cases of newspapers sent); Valery (*op. cit.*), 236.

¹⁶ Valery (*op. cit.*), 238.

which confers a benefit on the offeree.¹⁷ If a creditor sends a release of the debt to the debtor, or the pledgee returns the pledge to the pledgor, acceptance is implied from silence.

(b) Where business relations already exist between the parties, the acceptance of an offer is sometimes presumed from silence, especially when it refers to a pending negotiation. When a shopkeeper has occasionally sent you articles which you accepted and used, then if he sends you other similar articles, your failure to send them back, or to signify your dissent, is an acceptance.¹⁸ When there are running accounts between merchants, and one of them renders to the other, an account stated, to which no objection is made within a reasonable time, that silence is an acquiescence in its correctness.¹⁹ When a bank balances the book of a depositor and returns to him the checks and a statement of the account, the failure of the depositor to object thereto within a reasonable time, is an acquiescence in the account.²⁰ When the person to whom a policy of insurance was sent retains it for several months without objection, he is estopped afterwards to assert that it is different from the one for which he contracted.²¹

(c) When the offer has been asked for by a person to whom it is addressed. If a man advertises that he will buy old iron scrap, or any other article, a person who sends him such articles has a right to assume from his silence, that his offer is accepted.

§ 17 (viii). The Acceptance Must be Absolute and in Conformity With the Offer. It is self evident that an apparent acceptance which modifies or alters in any manner the offer

¹⁷ Valery (*op. cit.*), p. 92; Demolombe (*op. cit.*), i, n. 59.

¹⁸ Hobbs v. Massasoit Whip Co., 158 Mass. 194. See also Miller v. McManis, 57 Ill. 127; Yale v. Curtis, 151 N. Y. 598.

¹⁹ Standard Oil Co. v. Van Etten, 107 U. S. 325; Wiggins v. Burkham, 10 Wall. 129. In the latter case it is said that the presumption of acceptance by silence may be rebutted by proof of illness or absence.

²⁰ Leather Mfrs. Bank v. Morgan, 117 U. S. 96; Welsh v. German A. Bank, 73 N. Y. 424. Cf. Hardy v. Chesapeake Bank, 51 Md. 562.

²¹ Bostwick v. Ins. Co., 116 Wis. 392.

can impose no obligation upon the proposer. His willingness to do one definite thing cannot, by the act of the other party alone, be changed into a duty to do something else, even if it be very slightly different. It may be however that the offeree has used language in reply which was not a laconic unqualified acceptance but which was intended to be an acceptance or could fairly be taken as such. The question then is upon the interpretation of his words, whether or not they amount practically to an acceptance, or whether, by suggesting a modification, they are in effect a counter offer. If the acceptance leaves something essential for future arrangement, the parties are not agreed.¹

Illustrations. An offer to sell a given quantity of gunpowder at a certain price and of caps at a certain price, confers no right upon the offeree to order the specified quantity of powder and to decline to purchase the caps.² The reply to an offer of coal on certain terms was, "Telegram received. You can consider the coal sold. Will be in Cleveland and arrange particulars next week." This was held not to be an absolute acceptance.³ Brewer, J., said: "It is equivalent to this. There is so little to be settled, and I am so sure that all can be arranged, that you are safe in looking at the sale as closed and prepare to make your arrangements accordingly."

For the same reason, if one says, "you may consider that you have the contract," that is not an acceptance.⁴ When upon opening bids for certain private work, the defendant said to the plaintiff, "you are the lucky man," that was held

¹ *Utley v. Donaldson*, 94 U. S. 47; *Nat. Bank v. Hall*, 101 U. S. 43; *Bank of Col. v. Hagner*, 1 Pet. 463; *Canton Co. v. N. C. Ry. Co.*, 21 Md. 396. When an order given to a travelling salesman is accepted by him subject to the approval of his principal there is no complete contract and the offer may be revoked. *Baird v. Pratt*, 148 Fed. 825; 10 L. R. A. (N. S.) 1116; *Martin v. Wilms*, 61 Ill. App. 108. It makes no difference that the order states that it is not subject to countermand. *Peck v. Freese*, 101 Mich. 321.

² *Thomas v. Greenwood*, 69 Mich. 215.

³ *Martin v. Northwestern Co.*, 22 Fed. Rep. 596.

⁴ *Bissinger v. Prince*, 117 Ala. 480.

not to be an acceptance of his bid, especially since other negotiations were necessary.⁵

Where the offeree writes, "I would like to accept the offer and expect to have the money for it in about two weeks," that does not make a contract.⁶ But when an optional contract to sell coal land was accepted thus, "your coal will be accepted according to terms of the option given on the same, and respectfully request you to make delivery of the deed with abstract of title to me in Morgantown, on Saturday, June 28, 1902, hour and place to be decided later," it was held that the request superadded to the absolute acceptance, did not qualify it.⁷ If the offer is to furnish a tug and coal barges on certain terms "beginning before November 1st and continuing until May 1st" it is not accepted by agreeing to take the vessels, "from November 1st to May 1st."⁸ If the offer is to sell a designated quantity crude petroleum, of a guaranteed gravity of not less than 15°, it is not accepted by agreeing to take the oil with the understanding that the gravity is to be 15 degrees Beaume, at a temperature of 60° Fah.⁹

But where A. offered to give B. \$9.50 per ton for his hay, and B. said, "You can take the hay at your offer, but after you have hauled it, if the hay proves good enough so that you can pay \$10. per ton, I should like to have \$10." that is a complete acceptance.¹⁰ The addition of immaterial words to a reluctant assent does not modify it.

Plaintiff's sales memorandum sent to defendant stated that he had sold to the defendant 1,000 tons scrap steel rails of certain dimensions terms cash. vs. bill of lading. Defendant's letter of reply was not an unqualified accept-

⁵ *Leskie v. Haseltine*, 155 Pa. 98. A telegram to one who had submitted a bid in response to an advertisement saying: "You are low bidder; come on morning train," is not an acceptance. *Cedar Rapids etc., Co. v. Fisher*, 129 Iowa. 332; 4 L. R. A. (N. S.) 177.

⁶ *Thurber v. Smith*, 25 R. I. 60.

⁷ *Turner v. McCormick*, 56 W. Va. 161.

⁸ *Met. Coal Co. v. Boutelle Co.*, 185 Mass. 391.

⁹ *Four Oil Co. v. United Oil Producers*, 145 Cal. 623.

¹⁰ *Phillips v. Moore*. 71 Me. 78.

ance, but added the condition that the rails were to be of the P. R. R. pattern and were to come off of the Central Railroad of N. J. Plaintiff's answer to this, rejected the proposed condition and stated that the rails would come from the Southern Railway. Defendant then wrote that it was immaterial where the rails came from, "but it was understood that they are rails taken up from tracks and not rails picked up from sidings," also that "regarding drafts we will take this up as fast as the cars appear in sight." Plaintiff did not accede to the terms of this letter by an answer. It was ruled, that these letters did not show a complete agreement of the parties as to all the terms so as to constitute a final contract, but they consist of propositions and counter propositions which did not end in a definite conclusion; there being no distinct agreement as to the time of payment and no assent by the plaintiff to defendant's condition that the rails should not be picked up from sidings.¹¹

In some cases, it has been held that when an offer to sell land is accepted by a letter which fixes a different place for the delivery of the deed and the payment of the money, than the residence of the vendor, or other than the place named in the offer, is not an absolute acceptance.¹² But if the parties understand the mention of the different place of payment to be merely in the nature of a suggestion or request and not as a term of the acceptance it does not qualify what is otherwise an absolute acceptance.¹³

Place of acceptance. If the offer prescribes that an acceptance shall be made to the proposer at one place, it is not sufficient if the acceptance be sent to him at another place. A. wrote from Harper's Ferry to B. offering to buy flour and saying, "write by return of waggon whether you accept our offer." B. sent his acceptance by return of post to George-

¹¹ Joseph Bros. Co. v. Schonthal Co., 99 Md. 382. See also Duker Box Co. v. Dixon, 106 Md. 59, where certain letters were held not to constitute a final contract.

¹² Gilbert v. Baxter, 71 Iowa, 327; Langellier v. Schaefer, 36 Minn. 361; Baker v. Holt, 56 Wis. 100.

¹³ Kreutzer v. Lynch, 122 Wis. 474; Turner v. McCormick, 56 W. Va. 161.

town, where A. also had a place of business. This was held not to be a sufficient acceptance.¹⁴ The Court said: "Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent, this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place therefore to which the answer was to be sent, constituted an essential part of the offer."

"Letter follows." The offeree may reply to an offer by a brief telegram saying, "Accept your offer, letter follows," or using some such expression, and when the letter arrives, it may be found to contain certain modifications or not to be an unqualified acceptance. In such a case, the question is whether an absolute contract has been made in precise conformity with the offer, binding on both parties, or whether such an answer is to be regarded as insufficient, authorizing the offeror either to revoke the offer or to treat it as a rejection or counter offer. A writer says: "One should ask what meaning the offeror could have legitimately attributed to the expression, letter follows. These words are susceptible of two interpretations,—they could signify that the sender of the telegram accepts provisionally or in substance, but with certain reservations expressed in his letter, and subordinates the final formation of the contract to the acceptance of the conditions which he will indicate in the letter. They may also simply mean that the letter announced will contain directions as to the manner of carrying out the contract. If according to the intention of the acceptor these words have this latter meaning, no difficulty can arise and the contract is irrevocably made. But on the other hand, when they were designed to show that the consent given to the offer is only conditional, then the question arises whether the contract was made and the offeree can be compelled to perform it. Now the existence of the agreement can only result from the complete concord of the two wills. If the acceptance does not exactly conform to the offer, if it is conditional, this concord does not exist and consent is lacking. Consequently,

¹⁴ *Eliason v. Henshaw*, 4 Wheaton, 225.

when the purport of a telegram shows that the acceptor did not give his complete adhesion to the terms of the offer, when at the same time the sending of the letter followed on the heels of the telegram to show that at the moment of sending each of these missives, the intention of the author was the same, it cannot be maintained that the parties were agreed between themselves to create an obligation."¹⁵

It seems to me that this statement of the principle does not give sufficient weight to the right of the offeror to attribute to the words of the telegram their natural meaning, and that when a telegram contains an absolute acceptance, the addition of the words, "letter follows" may fairly be construed as meaning that the letter will be a mere confirmation or contain shipping directions, and that consequently a complete contract is made by such a telegram. In a case where to a clear acceptance of an offer certain ambiguous words were added, Lord Westbury said that "It would be contrary to reason and every rule of construction to put an interpretation upon ambiguous words that shall defeat or qualify words which are clear and explicit."¹⁶

It has been held however, in a case where the telegraphic answer to an offer was: "We accept your quotation, etc. Particulars by letter today," that no contract was made since the letter varied from the offer.¹⁷ In another case the acceptance of an offer was followed by the statement: "Contract mailed," and this too was held not to be an unqualified acceptance.¹⁸ This case involves questions relating to the signing of a formal contract which will now be considered.

Future contract to be executed. Not infrequently in accepting an offer, a man suggests or asks that a written contract be prepared and signed which shall embody the terms of the agreement. And the offer itself sometimes stipulates for the preparation of a future writing. Now in these cases, the question is whether the existence or enforceability of the

¹⁵ Valery (*op. cit.*), p. 114.

¹⁶ English and Foreign Credit Co. v. Arduin, L. R. 5 App. Cas. 79.

¹⁷ Lynchburg Hosiery Mills v. Chesterfield Mfg. Co., 107 Va. 73.

¹⁸ Runyon v. Wilkinson, 57 N. J. L. 420.

contract depends upon the execution of the writing and the parties do not intend to be bound unless they agree upon and sign the written terms, or, on the other hand, whether they are bound and intend to be bound by the previous agreement and design the formal writing chiefly as the evidence or proof of their agreement. If the intention is that the execution of the writing shall be essential to the contract, then, borrowing the terms used in this connection in the civil law, we may say that the writing was designed *ad solemnitatem*, as the essential, final form of the contract, and necessary to its validity. If, however, the parties are really agreed and intend the writing to serve as evidence of the agreement, then it is designed *ad probationem*.

Parties are at liberty to make the perfecting of their contract depend upon a writing, although not required by statute. But the mere fact that a writing has been stipulated for does not create any presumption that it is to be essential to the validity of the contract. That must appear to have been their intention by an express declaration to that effect or by necessary implication. When the parties have fully agreed upon the terms, the mention of a future writing should be held, in case of doubt, to have been demanded *ad probationem* rather than *ad solemnitatem* or *ad validitatem* of the contract. If the writing be held to be *ad solemnitatem*, then the agreement of the parties is unenforceable unless it be signed. If on the other hand, it is evidentiary or *ad probationem*, the contract is valid at once, binding each party to perform, and also to the execution of the writing.

An agreement for the sale of goods by A. to B. provided that a written contract should be executed by them. Afterwards A. wrote to B. enclosing a formal written contract, containing the terms agreed upon, with the request that it be executed and returned, and saying that upon receipt, the writer would forward a properly executed duplicate. B. signed the contract and returned it to A. by whom it was retained, but A. subsequently refused to execute and send to B. the duplicate as promised, and repudiated the agreement. It was held that A. was as effectually bound by the letter

forwarding the contract for B.'s signature, who executed it, as if he had signed and delivered a duplicate copy.¹⁹

Future writing ad probationem. When one party writes, "I will request Mr. B. to draw up the usual contract for us," this reference does not negative the existence of a binding agreement as contained in their letters.²⁰ A. wrote to B. "I offer you £ 3,000 for the estate." B. replied, "I accept your offer and if you approve of the enclosed, sign the same, and I will on receipt of the deposit, sign you a copy." This was held to be a binding contract, the enclosure being only the means of carrying it into effect.²¹ An offer thus accepted was held sufficient to complete the contract. "These terms I have submitted to Mrs. S. and I am authorized to say they are accepted and that her solicitor will draw up a proper agreement for signature which I will forward to you."²² So also when the offeree accepts and adds that his solicitor will prepare the contract.²³

Plaintiff offered in writing to sell ten carloads of apples on specified terms. Defendant requested certain modifications of these terms, which were agreed to by plaintiff by telegram saying, "Will accept conditions. If satisfactory, answer and will forward contract." Defendant's reply to this was, "All right, send contract as stated." The contract prepared by the plaintiff contained precisely and only the terms agreed upon by the letters and telegrams. This was returned by the defendant with certain changes made in it which did not correspond with the letters, and which were not acceded to by the plaintiff. It was held that the parties had agreed upon all the terms of the sale by correspondence and that the failure to sign the writing as contemplated did not affect their obligation and that the plaintiff was entitled

¹⁹ *Noel Co. v. Atlas Cement Co.*, 103 Md. 209. Cf. *Bonaparte v. Thayer*, 95 Md. 548.

²⁰ *Cheney v. Eastern Transportation Line*, 59 Md. 566.

²¹ *Gibbins v. North Eastern District*, 11 Beaven, 1.

²² *Skinner v. McDonall*, 2 DeG. & Sm. 265.

²³ *Bonnewell v. Jenkins*, L. R. 8 Ch. D. 70. See also *Bolton v. Lambert*, L. R. 41 Ch. D. 295.

to sue on the contract made by the correspondence.²⁴ The Court said: "Any other rule would always permit a party who has entered into a contract like this, through letters and telegraphic messages, to violate it, whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions."

When in pursuance of his authority, a municipal official advertised for bids for doing certain public work, according to specifications, and plaintiff's bid was accepted and the contract awarded to him by the Board of Estimates, a final and binding contract is thereby made, although the city charter provides that the successful bidder for city work shall execute a formal contract to be approved as to its form, terms and conditions by the city solicitor, and when the formal contract is prepared, no terms can be inserted therein, not warranted by the papers evidencing the contract.²⁵

Future writing ab solemnitate. When the offer is to enter into a lease, the execution of it is essential to the existence of the contract.²⁶ An acceptance of an offer "subject to the preparation and approval of a formal contract" makes the writing essential.²⁷ So is an acceptance "subject to a contract to be settled."²⁸ Or "subject to the terms of a contract being arranged."²⁹ Or when the offeree says, "I will make a contract giving the right to go upon the lands and cut the timber."³⁰ If it is an essential part of the agreement, that it shall be reduced to writing the final consent of the parties is suspended, the contract is inchoate, incomplete and it cannot be enforced until it is signed by all the parties.³¹

²⁴ *Sanders v. Pottlitzer Bros. Co.*, 144 N. Y. 209; 29 L. R. A. 431.

²⁵ *American Lighting Co. v. McCuen*, 92 Md. 703. See also *Drummond v. Crane*, 159 Mass. 577; 23 L. R. A. 707.

²⁶ *Wills v. Carpenter*, 75 Md. 80, 86.

²⁷ *Winn v. Bull*, L. R. 7 Ch. D. 29. See also *Appleby v. Johnson*, L. R. 9 C. P. 158.

²⁸ *Harvey v. Principal*, 50 L. J. Ch. 750.

²⁹ *Honeyman v. Marryatt*, 6 H. L. C. 112.

³⁰ *McDonald v. Bewick*, 51 Mich. 79.

³¹ *Ambler v. Whipple*, 20 Wall. 546; *Canal Co. v. Burgin*, 106 La. 310; *Crossley v. Maycock*, L. R. 18 Eq. 180; *Edge Moor Works v. Bristol*, 170 Mass. 532.

If upon an agreement for the sale of land, the preparation of a formal contract by the vendor's solicitor is construed to be *ad solemnitatem*, that stipulation cannot be waived by him, so as to allow him to insist upon a performance of the contract without it.³²

If work has been done under a contract not put into writing according to an agreement, there may be a recovery for it under a *quantum meruit*.³³

§ 18. (ix). **The Acceptance Must be by the Person to Whom the Offer is Made, Unless Made to the Public.** It is obviously the right of the party who initiates a contract, to choose the person with whom he is willing to deal and his offer is communicated only to the person to whom he speaks. No one else has a right to accept it. If Titius declares his purpose to sell an article without addressing any particular person, Caius has no right to take him at his word, since Titius could reply, "Did I speak to you? I intended to contract with anybody but you, in whom I have no confidence." If Titius tells Sempronius that he intends to sell an article to Caius without giving him any authority to speak of it to Caius, even then, Caius has no right to take him up, since Titius could say, "I have not fully made up my mind, and therefore have not spoken to you. I had an uncertain purpose which I have abandoned."¹

The effect of the acceptance of an offer by a person to whom it was not addressed is considered in the subsequent chapter on mistake.

When the offer is made to the public at large, then it may be accepted by anyone. A shopkeeper, for instance, who marks the prices on articles displayed in his window, becomes bound to any of the public who accepts the offer, because the intention to contract is manifest.² But if the offer is to buy or sell certain kinds of goods at named prices, no contract

³² Lloyd v. Nowell [1895], 2 Ch. 747.

³³ Canal Co. v. Burgin, 106 La. 310.

¹ Giorgi (*op. cit.*), iii, n. 210.

² Huc, Comm. vii, 41.

is formed by tendering articles of that kind or by giving an order for them, because no quantity is mentioned in the offer. Such an offer is lacking in certainty and definiteness. If a published offer to buy Southdown sheep at a certain price could be accepted by the public so as to make final contracts, the offeror would be bound to buy all the sheep in the country.

Offers to the public are generally offers of rewards for the return or discovery of lost or stolen property or for information leading to the arrest or conviction of an offender.³ It is implied in such an offer that the first person who supplies the information shall be entitled to the reward.⁴ "Although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the offer."⁵

The performance of the services asked for in these cases is the acceptance of the offer. Now since both logically and legally there can be no acceptance of an offer of which the acceptor has no knowledge, the rendition of the services by a person who did not know that a reward had been offered cannot create a contract. This is the ruling of the majority of the Courts which have passed on the question.⁶ But some Courts, entirely departing from the principle that the obligation of the person who offers the reward is contractual, have held that the finder of lost property who returned it in ignorance of the reward is nevertheless entitled to recover.⁷

³ Offers of this kind are of great antiquity. An inscription found at Pompeii reads as follows: "*Urna aenea pereit de taberna. Si quis rettulerit dabuntur LXV.*" And this was found engraved on a Roman dog collar: "*Fugit, tene me, cum revocaveris me domino meo Zosimo accipies solidum.*" (Cited in Giorgi, vol. iii, p. 253 (*sesta ed.*))

⁴ *Higgins v. Lessig*, 49 Ill. App. 459; *Jauvrin v. Exeter*, 48 N. H. 86; *Turner v. Walker*, L. R. 2 Q. B. 301; *Thatcher v. England*, 15 L. J. C. P. 241.

⁵ Bowen, L. J., in *Carlill v. Carbolic Smoke Ball Co.* [1893], 1 Q. B. 256.

⁶ *Williams v. West Chicago R. Co.*, 191 Ill. 610; *Fitch v. Snedaker*, 38 N. Y. 248; *Marvin v. Treat*, 37 Conn. 96; *Wilson v. Stump*, 103 Cal. 255.

⁷ *Dawkins v. Sappington*, 26 Ind. 199; *Auditor v. Ballard*, 72 Ky. 572.

When the reward is offered to a limited class of the public, it can be accepted only by one of that class, according to the rule that an offer can be accepted only by the person to whom it is addressed.⁸ In the case of a reward for the arrest of a criminal, it cannot be claimed by a police officer or other person whose duty it was to make the arrest, not because the offer was not addressed to him, but because there was no consideration for a promise to pay a man for doing his duty, and also on the grounds of public policy.⁹

Since in the case of the offer of a reward for services to be performed, the doing of the act is the acceptance, it is necessary to consider the terms of the offer and what was done in order to determine whether or not a contract was made.¹⁰ The claimant of a reward offered for the arrest and conviction of an offender must show that he caused both the arrest and the subsequent conviction.¹¹

§ 19 (x). **An Absolute Acceptance of the Offer Creates the Final Contract.** When an agreement has once been made between certain persons, it cannot be annulled or modified by the act or words of one of them alone. It takes two to unmake a bargain as well as to make it. Neither the offer nor the acceptance is revocable or subject to modification by the act of one party alone.¹ Thus when the express contract between a principal and his agent does not require the agent to insure the goods entrusted to him, such obligation is not imposed by the mere fact that upon the invoice sent with the goods consigned there is printed the words, "stock to be kept covered

⁸ *First Nat. Bank v. Hart*, 55 Ill. 62.

⁹ *Smith v. Whildin*, 10 Pa. St. 39; *Hogan v. Stoplett*, 179 Ill. 150.

¹⁰ *Williams v. West Chicago R. Co.*, 191 Ill. 610; *Jones v. Phoenix Bank*, 8 N. Y. 228.

¹¹ *Furman v. Parks*, 21 N. J. L. 310; *Central R. Co. v. Cheatham*, 85 Ala. 292. If the person arrested commits suicide in jail before trial, the reward cannot be recovered because there has been no conviction. *Fortier v. Wilson*, U. C. 11 C. P. 495. As to premiums to architects for plans, see *Walsh v. St. Louis Ass'n.*, 16 Mo. App. 502; *Cope v. Hastings*, 183 Pa. 300.

¹ *Dale v. See*, 51 N. J. L. 378; 5 L. R. A. 583; *Bellamy v. Debenham*, L. R. 45 Ch. D. 481.

by insurance for the benefit of the consignor," and the agent retained the goods without objecting to this notice.²

But the question sometimes arises as to the effect of negotiations carried on between the parties after a complete acceptance. As a general rule, what one party may say as to his interpretation of the agreement can have no effect upon the rights and obligations of the other, unless it be such a renunciation of the contract as amounts to an anticipatory breach. A contract was made in April between X., seller, and A., buyer, for the sale of cotton ties, and another contract in June for another lot to be delivered in August. Afterwards there was a controversy as to the delivery of the April ties, and A. wrote on July 8th, "as you decline to comply with your contract, we hereby cancel all contracts with you." X. replied, "Our contracts are not subject to cancellation, hence will not cancel." A wrote, "We will not receive or pay for any ties from you." X. afterwards offered delivery. Still later, when A. directed shipment of both contracts, X. replied, "All the contracts between us having been cancelled by you, we have sold the ties to other parties." In an action for breach of the June contract, it was held that there had been no rescission because not agreed to; that the contract was in force and that the seller was liable.³

In *Wheeler v. New Brunswick R. Co.*,⁴ it appeared that on January 31st, there was a written agreement between Wheeler and the Vice-President of the railway company for the sale to the former of one thousand tons of old rails for delivery before August 1st. On February 17th, the Vice-President sent a corporate ratification of the sale which stated the tons to be of 2,000 lbs. On February 28th, Wheeler replied that he understood the sale to have been absolute, requiring no ratification, and that the tons were of 2,240 lbs. There was no reply from the railway company until June 1st, after a fall in the market price of rails, when it wrote that to avoid dispute it would deliver tons of 2,240 lbs.

² *Sturtevant Co. v. Dugan*, 106 Md. 587.

³ *Gentry Co. v. Margolino Co.*, 110 Tenn. 669.

⁴ 115 U. S. 29.

Wheeler answered that he did not recognize the existence of a contract of sale and refused to designate a place of delivery. The trial Court found as a fact that the Vice-President had authority to make the contract and that when it was made, each party then understood the tons to be of 2,240 lbs. It was held that that was a final contract which the company was not estopped from setting up and had not repudiated it in such a way as to discharge Wheeler from his obligation. Four Justices dissented in this case, and held that Wheeler had a right to take the railway company at its word and to act on its solemnly announced understanding of the contract; that Wheeler had done so, and had refrained from turning the contract to any benefit by the resale of the rails.

The dissenting opinion in this case, which is a strong one, shows that there may be cases in which the conduct of one party after the making of the contract may be such as to estop him from denying the validity of the construction placed upon it by the other party, although it may not be the correct one. A case where such estoppel operated has been previously cited.⁵ Suppose for instance that a merchant has made a contract through an agent. Afterwards in a letter to the other party, reciting the terms of the agreement, he shows that he understands the contract to be absolute when in fact the other party had understood it to be conditional, and it had been so made by the agent. If the person to whom the letter was addressed does not protest against the construction or claim that the contract really was conditional, should not his silence be construed as a tacit acquiescence in the modification made by the letter?⁶

After a complete contract has been made by the absolute acceptance, the language or conduct of one of the parties may be such as to authorize the other party to treat it as repudiated, and to consider himself as exonerated from performance, and to sue for a breach. Some of the questions which arise in such a case are dealt hereafter in Part VI relating to the extinguishment of contracts.

⁵ *Snead & Co. v. Merchants Loan & T. Co.*, 225 Ill. 442; 9 L. R. A. (N. S.) 1007.

⁶ *Valery (op. cit.)*, 97.

Finality of agreement. When the negotiations leading up to a contract take place by correspondence, many letters being exchanged, and at a certain point, an agreement seems to have been reached, still such agreement will not be held to constitute a final contract when the succeeding letters between them show that they did not intend to abide by such terms as a complete expression of their intention.⁷ Although two letters taken alone may be evidence of a sufficient contract, yet a negotiation for an important term carried on afterwards, is enough to show that the contract was not complete.⁸ But if at a certain point in the correspondence there is a complete contract, it does not lose its binding force because the parties afterwards go on to negotiate about other matters.⁹

CONTRACTS BY CORRESPONDENCE AND TELEGRAPH.

§ 20. **Communication and Revocation of Offer.** The concurrence of two persons in willing the same thing, when the contract is made by correspondence, cannot be actually simultaneous, but these two persons are treated as being in accord by means of certain presumptions of law and of fact. When a man makes an offer by post or telegraph, he is presumed to be of the same mind when the offer reaches the person addressed, and the latter need not concern himself with the question whether the offeror had meanwhile changed his purpose or not.

A revocation of that offer is not effectual until notice of the revocation reaches the offeree before his acceptance. Hence the acceptance of an offer so made binds the bargain, although prior to such acceptance the offeror had written and posted a letter revoking his offer. In several cases, a letter of acceptance and a letter revoking the offer have crossed

⁷ *Hand v. Evans Marble Co.*, 88 Md. 226.

⁸ *Bristol, &c., Bread Co. v. Maggs*, L. R. 44 Ch. D. 616.

⁹ *Hussey v. Horne Payne*, L. R. 4 App. Cas. 311. In 7 Law Quarterly Rev. 10, it is said that spelling out a contract from informal correspondence requires great care, and that this case comes opportunely to qualify the dangerous doctrine of Kay, J., in *Bristol, &c., Bread Co. v. Maggs*, *supra*, which if followed out would go far to neutralize all contracts by correspondence.

one another in the mails, and it has been uniformly held that such a revocation was insufficient, and the contract completed by the posting of the letter of acceptance.¹ In *Wheat v. Cross*,² W. had in his possession a horse belonging to C. and on September 12th, wrote to C. offering \$140. for the horse, saying, "You can draw on me at sight for \$140." This letter was received on September 15th or 16th. C. accepted the offer on the 16th by drawing on W. for \$140. On the same day, W. wrote revoking his offer, but this letter was not received by C. until after the draft had been dispatched. Upon these facts, it was held that a valid contract had been made, and that until notice of withdrawal actually reached the buyer, his offer was continuing and the acceptance by the seller completed the contract.

This rule requiring the revocation of the offer to be communicated before acceptance, does not mean that the offeree must always have actual knowledge of it, but constructive notice may be sufficient. If, for instance, after a letter of revocation has been delivered to the offeree and before he opens and reads it, he writes and posts an acceptance, such an acceptance would be nugatory.³

§ 21. **Time of Acceptance of Offer.** A question of much more theoretical difficulty is this, when is an offer by correspondence accepted so as to complete the contract? Since there must needs be a certain lapse of time between the moment when the offeree did really declare his assent and the moment when knowledge of that acceptance reaches the offeror, the question naturally is whether the contract was formed at the time the acceptance was declared or exhibited, or at the time it was despatched, or at the time it became known to the offeror. This subject has been discussed by

¹ Harris' Case, L. R. 7 Ch. 587; *Byrne v. Van Tienhover*, L. R. 5 C. P. D. 344; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390, and cases in sec. 22, notes.

² 31 Md. 99.

³ *In re London & Northern Bank* [1900], 1 Ch. 220. If the offer and a revocation of it are received by the offeree at the same time the offer is nullified.

great Continental jurists for a long time. Advocating the theory of information, according to which the contract is not formed until the acceptance is communicated to the offeror, we find Grotius, Heineccius and most of the French jurists. This was formerly the rule in Massachusetts.¹ On the side of the theory of declaration, according to which the contract is complete as soon as the offeree has declared his intention, there were Cujas, Savigny, Puchta, and many others.²

This question seems to have been presented for the first time to an English Court in 1818 in *Adams v. Lindsell*,³ and the decision then made has since been followed in English and American law. In that case, the defendant had offered by letter to sell a quantity of wool to the plaintiffs, who had accepted before notice of a revocation. Counsel argued that until the plaintiffs' answer was actually received, there could be no binding contract between the parties and before then the defendants had retracted their offer by selling the wool to other persons. "But the Court said, that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs until the answer was received, then the plaintiffs ought not to be bound until after they had received the notification that the defendants had received their answer and assented to it. And so we might go on *ad infinitum*. The defendants must be considered in law as making during every instant of the time their letter was travelling the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."

This *reductio ad absurdum* argument is a practical, common-sense, rule-of-thumb way of deciding the question. But I think the same result is arrived at in a more juridical method in the following summary of an argument combatting

¹ *McCulloh v. Eagle Ins. Co.*, 1 Pick 278, which is in effect overruled by *Brauer v. Shaw*, 168 Mass. 198.

² There are also certain mixed or eclectic theories on the subject which are set forth, together with those mentioned in the text, by Valery (*op. cit.*), pp. 128 *et seq.*

³ 1 B. & Ald. 681.

the opposite theory:⁴ The contract is formed by a union of two wills. Now the two wills united at the moment the offer was in fact accepted. Therefore from that moment also the contract was formed. The syllogism proceeds well and the deduction will be inevitable unless in conflict with some text of the Civil Code. But not only does no text require for the formation of a contract that the acceptance should be known to the offeror, but all the texts virtually assume that this condition is not necessary.

You send me on July 1st, a letter directing me to buy a house for you. On July 2nd, upon receipt of your letter, I execute the order and buy the house for you. Then I write you on the same day a letter by which I announce that your commission has been executed. Would you have the right to retract after the execution of your order, although before the receipt of my letter? Would your death or insanity occurring after the execution of the order, though before the receipt of my letter, prevent the formation of the contract of agency and render null the purchase I made for you? According to the theory that the contract is not made until the acceptance becomes known to the offeror, these questions would have to be answered in the affirmative. But such an answer is impossible in view of the express provision (Art. 1983) that the acceptance of an agency may be tacit and result from the doing of the thing directed.

Now, if this rule is admitted so far as a contract of agency is concerned, it must be recognized in the case of other contracts, for it is obvious that it is not a special rule for this class of contracts, but is a general principle of law. In fact, such is the force of this rule that it carries along even those who theoretically have undertaken to dispute it. Let us hear, for instance, Troplong, who says; "You ask me by a letter dated January 10th, to sell you for 3,000 fr. a cask of Bordeaux wine that I have in my cellar, and which you need for the 11th of the same month at noon. I do not reply at once, but at the hour and on the day named, I send you the wine asked for and request you to remit the price. It

⁴ Demolombe, *Traité des Contrats*, i, n. 75.

must be held that there is a bilateral contract and that you could not refuse to carry out the bargain. Your agreement as to the subject-matter and the price is proved by your letter,—mine by the shipment I made you before receiving any revocation. Both of us are bound.” That is none other than our contention.

It is objected in vain that an acceptance is of the same nature as an offer, and that since the offer has no effect until known by him to whom it is addressed so the acceptance also should not have any effect until known by him who made the offer. There is, on the contrary, a very great difference between an offer and the acceptance, and this reciprocity is by no means necessary. One cannot conceive of a contract without the agreement of two wills, and consequently if the offer was revoked before its acceptance, the concurrence of the two purposes being impossible, the contract obviously cannot be formed. But on the other hand, it is the acceptance itself which creates the contract by a union of the two wills and that is what profoundly differentiates it from the offer. In order that an acceptance may create a final contract, it is only necessary that it be itself irrevocable. So when the acceptance is irrevocable, the contract is made and I would not even have conceded to Merlin that a contract was not made in the rather strange illustration he gives of that man who having in his office an acoustic vault, retracts his acceptance of an offer given by this means before it reached the offeror.⁵ Practical convenience, especially in commercial affairs, also seems to us to agree with the principles of law to establish the doctrine according to which the contract is formed at the moment the offer is accepted without its being necessary that the acceptance should be known by the offeror.

§ 22. **Posting Letter—Overt Act of Acceptance.** The rule that the posting of a letter of acceptance completes the con-

⁵ This is a reference to the argument of Merlin in the case of *S. v. F.*, which is contained in Langdell's *Cases on Contract*, and also in Keener's *Cases on Contracts*.

tract is firmly established by many decisions.¹ A reason sometimes given for this rule is that since the offeror selected the postoffice as the means of communicating his offer, it is his agent to receive the acceptance, and a delivery of it to that agent is communication to the principal. But the true doctrine is that the postoffice is the common agent or vehicle of both parties for the transmission of their messages. An acceptance by letter is sufficient although the offer may have been communicated personally.² The postoffice is the ordinary and usual means of communication between parties.

In *Henthorn v. Fraser*,³ Lord Herschel said: "It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by post. He needs no authority to transmit his acceptance through any particular channel; he may select what means he pleases, the postoffice no less than any other. The only effect of the supposed authority is to make the acceptance complete as soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached.

"I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind, the post might be used as the means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

¹ *Taylor v. Merchants' Fire Ins. Co.*, 9 Howard, 390; *Patrick v. Bowman*, 149 U. S. 411; *Stockham v. Stockham*, 32 Md. 208; *Hallock v. Com. Ins. Co.*, 26 N. J. L. 268; *Brauer v. Shaw*, 168 Mass. 198; *Abbott v. Sheppard*, 48 N. H. 14; *Mactier v. Frith*, 6 Wendell, 103; *Watson v. Russell*, 149 N. Y. 388; *Chytrans v. Smith*, 141 Ill. 231; *Ferrier v. Storer*, 63 Iowa, 484; *Stevenson v. McLean*, L. R. 5 Q. B. D. 346. This rule as to the effect of posting a letter is of course confined to letters which are acceptances. If a man is required to give a certain notice, as for instance to terminate a policy of insurance, and he gives it by letter, the notice is not effective till it reaches the person addressed. *Crown Point Co. v. Aetna Co.*, 127 N. Y. 608.

² *Bruner v. Moore* [1904], 1 Ch. 305; *Henthorn v. Fraser* [1892], 2 Ch. 27.

³ [1892] 2 Ch. 27.

It has been ruled that when the offer is made by letter and an acceptance is sent by telegraph, and such mode of acceptance was not expressly authorized by the proposer, then the acceptance is not complete until it actually reaches the offeror.⁴ But since the telegraph is an ordinary channel of communication, it would seem that this decision is at least questionable.⁵ When an offer is made by a telegram, the contract is complete as soon as the telegram of acceptance is sent and is not suspended until its arrival.⁶

The contract as completed by the posting of the letter of acceptance is not affected by the fact that the transmission of the letter was delayed by casualties in the postoffice department.⁷ If the letter is lost so that the acceptance never does reach the offeror, the contract is nevertheless complete and final.⁸

A letter is not treated as posted within the meaning of this rule unless it is properly addressed;⁹ and bears a stamp.¹⁰

⁴ *Lucas v. W. U. Tel. Co.*, 131 Iowa, 669; 6 L. R. A. (N. S.) 1017. But see *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380.

⁵ If both parties live in the same city and the offer is made personally and does not expressly authorize the acceptance to be communicated by the mail, it may very well be that such an acceptance does not complete the contract until it is actually received by the offeror. The question perhaps depends upon the presumed intention of the parties. In *Henthorn v. Fraser*, *supra*, the plaintiff did not live in Liverpool, but he received the offer while there at the defendant's office. The Court said that, "it must have been in contemplation that he would take the offer, which by its terms was to remain open for some days, with him to his place of residence, and those who made the offer must have known that it would be according to the ordinary usage of mankind that if he accepted it he should communicate his acceptance by means of the post." The reason why a complete contract is made by the posting of the letter of acceptance is that the offer expressly or impliedly authorized such mode of acceptance. *Household Fire Ins. Co. v. Grant*, L. R. 4 Ex. D. 216.

⁶ *Trevor v. Wood*, 36 N. Y. 307; *Minn. Oil Co. v. Collier Co.*, 4 Dillon, 431; *Cobb v. Force*, 38 Ill. App. 255.

⁷ *Dunlop v. Higgins*, 1 H. L. C. 381.

⁸ *Household Fire Ins. Co. v. Grant*, L. R. 4 Ex. D. 416. See *Bishop v. Eaton*, 161 Mass. 501; *Emerson Co. v. Proctor*, 97 Me. 366.

⁹ *Henderson v. Carbondale Co.*, 140 U. S. 37. But if the proposer himself gives a wrong address, the use of that is sufficient. *Townsend's Case*, L. R. 13 Eq. 148.

¹⁰ *Blake v. Hamburg Ins. Co.*, 67 Tex. 160.

Giving a letter to a messenger who neglects to put it in the postoffice is of course not a posting.¹¹ It has been ruled that putting a letter in a private letter box where the offeror was accustomed to receive his mail is sufficient.¹²

The time within which the acceptance must be despatched depends upon the nature of the offer and is governed by the rules previously set forth concerning offers in general. If a question arises as to the day on which a letter was sent, evidence is admissible to show a mistake in its written date.¹³

It is of course permissible for the offeror to prescribe the actual receipt by him of the acceptance as necessary to complete the contract and in such case, the mere posting of the letter is not sufficient for that purpose. Thus when the proposer says, "If you agree to this plan and will telegraph me upon receipt of this, I will forward power of attorney, etc. Telegraph me 'yes' or 'no' * * * if I do not hear from you by the 18th, I shall conclude 'no' ", it was held that this offer required the actual communication to the offeror of an acceptance on or before the date named.¹⁴

The decisions cited on this subject speak of the posting of the letter or despatch of the telegram as constituting the acceptance. This no doubt is essential when the offer requires a counter promise. But when the offer is of a promise for an act, then it would seem to be clear that the doing of the act without any written acceptance would be sufficient. If you write for instance to a merchant in a distant city directing him to send certain goods to a third party and to charge your account with the price, his sending the goods ordered would be an acceptance completing the contract. You could not afterwards revoke your order although he had not written you an acceptance. The same rule of course is applicable if the order given is for the shipment of goods directly to you

¹¹ *Maclay v. Harvey*, 90 Ill. 525. Giving the letter to an official letter-carrier is a posting. *Pearce v. Langfit*, 101 Pa. 507.

¹² *Howard v. Daly*, 61 N. Y. 362.

¹³ *Stockham v. Stockham*, 32 Md. 208; *Dunlop v. Higgins*, 1 H. L. C. 381.

¹⁴ *Lewis v. Browning*, 130 Mass. 175. See also *Haas v. Myers*, 111 Ill. 421.

and which is accepted by their being shipped. The principle is that the acceptance must be manifested by an overt act and the sending of a letter is such a manifestation. But a different manifestation may be sufficient if it is expressly or impliedly authorized by the proposer.¹⁵

§ 23. **Revocation of Acceptance.** The question has been mooted whether an acceptance once posted can be anticipated by a revocation which reaches the offeror before he receives the acceptance—whether, for instance, the acceptor after posting a letter of acceptance can reject the offer by a telegram which is received by the offeror hours or days before he receives the acceptance. There seems to be no English or American decisions upon this precise point where the offer was made by letter. But it has been held that when the offer, which was not itself made by letter, is accepted by a letter, then the acceptance is under control of the sender, though mailed, until delivery, and that the acceptor may revoke his acceptance by a telegram to the postmaster intercepting it and procuring its return.¹

If the principle that the contract is completed by posting the letter of acceptance is logically carried out, it must be held that such a letter cannot under any circumstances be revoked, and therefore cannot be anticipated by a telegram of rejection. The fact that under the United States Postal Regulations the sender of a letter may under certain circumstances reclaim it before delivery, can make no difference since the acceptor has already declared his assent.

Sir W. Anson says that “if acceptance takes place when a letter is put into the post-office, a telegram revoking the acceptance would be inoperative though it reach the offeror before the letter. It is not easy to see how the English Courts could now decide otherwise, nor is it easy to see that any hardship need arise from the law as it stands.”

In a former edition of his work on Contracts, Sir F. Pollock said: “If the contract is absolutely bound by posting a

¹⁵ See *ante*, § 15.

¹ Scottish Am. Mortgage Co. v. Davis, 96 Texas, 504.

letter of acceptance, a telegram revoking it would be too late and this even if the letter never arrived at all, so that the revocation were the only notice received by the proposer that there ever had been an acceptance. It is hard to believe that any Court would decide this. In Scotland, indeed, it has been decided the other way." But in the seventh edition, he says (p. 36): "English Courts may now be bound to hold that an unqualified acceptance once posted cannot be revoked even by a telegram or special messenger outstripping its arrival."

In Halsbury's Laws of England² it is said: "On principle, it is submitted that a letter of acceptance which has been anticipated in this manner is not binding on the person by whom it was sent." This rule resembles the eclectic or mixed theory propounded by Windscheid³ in regard to contracts by correspondence. His system makes a distinction between the proposer and the acceptor. As to the former, the contract is perfected as soon as the acceptance has been manifested by some overt act, although it has not come to his knowledge. But to bind the acceptor, it is necessary that his acceptance shall have been communicated to the proposer—until then the contract halts; it is a *negotium claudicans*; it is complete so far as the proposer is concerned, but not for the acceptor.

Some of those who maintain that an acceptance may be anticipated, justify this derogation from the general rule by basing it upon considerations of equity. What difference does it make, they say, if the acceptor changes his mind and

² Title Contracts, § 730.

³ Pandekten, § 308. In § 306, n. 3, he says: "The declaration of will which I express to one is mine till it reach him. The acceptance is complete, but the communication is not, and because the communication is not complete I may take back the declaration. No theory can ever count upon general favor which forbids the offeree to call back a messenger dispatched with his answer or to recall a letter which he has posted * * *. Some contend that it is anomalous that the proposer should be bound sooner than the offeree, but the proposer must accept this as a consequence of the method of making the contract chosen by him." Windscheid approves the case of *S. v. F.*, referred to in the preceding section.

annuls his first decision, when the other party did not know of it and consequently suffered no damage by the change? "This is a feeble argument upon which to found an exception to the clear and definite principle that when contracts are legally made, they cannot be revoked except by the mutual consent of the parties. Moreover, to admit this exception would be to adopt the theory that the acceptance must be communicated, since the definitive formation of the contract would be postponed to the moment when the acceptance reaches the hands of the offeror. Until then, in reality, the contract would be subject to a potestative condition on the part of the acceptor. Besides, the equity relied on to justify this *jus singulare* instead of calling for its admission is opposed to the notion that the offeror may be irrevocably bound while the acceptor may still be able to withdraw. Not only would such a rule be inequitable but it would open the door to certain frauds."⁴

It has also been objected that under such a rule, the offeree would have an opportunity to take unfair advantage of a change in the condition of the market. For example, A. offers to sell B. grain at a certain price. B. accepts, but before the letter of acceptance reaches A. there is a fall in price and B. telegraphs a revocation of his acceptance which reaches A. before or simultaneously with the acceptance. Or, A. may order insurance on certain property and the insurer accepts by posting a policy. If the property is destroyed by fire while the policy is in course of transmission, the insurer could under this rule revoke it by telegram.⁵

It is well said in *Hallock v. Commercial Ins. Co.*⁶ that, "The meeting of two minds, the *aggregatio mentium*, necessary to the constitution of every contract must take place *eo instanti* with the doing of any overt act intended to signify to the other party the acceptance of the proposition, without regard to when that act comes to the knowledge of the other party; everything else must be a question of proof or of the

⁴ Valéry (*op. cit.*), p. 181.

⁵ Thöl, Handelsrecht, § 239.

⁶ 26 N. J. L. 268.

binding force of the contract by matters subsequent. The overt act may be as various as the form and nature of contracts. It may be by the fall of the hammer, by words spoken, by letter, by telegraph, by remitting the article sent for, by mutual signing or by delivery of the paper, and the delivery may be by any act intended to signify that the instrument shall have a present vitality. Whatever the form, the act done is the irrevocable evidence of the *aggregatio mentium*; at that instant the bargain is struck. The acceptor can no more overtake and countermand by telegram his letter mailed than he can his words of acceptance after they have issued from his lips on their way to the hearer. If the two minds do not meet *eo instanti* with the act signifying acceptance, when can they, in the nature of things, ever approach each other more closely?

§ 24. **Contracts by Telegraph—Alterations.** When the offer has been made by a telegram, or when it can be inferred that this method of communication has been authorized, the sending of an acceptance by telegraph completes the contract from that time.¹ But if it was the intention of the offerer that the telegram of acceptance should reach him, then merely sending the telegram does not complete the contract.²

When a telegram making an offer is altered in the course of transmission, and the offeree accepts it in good faith, the question whether the offerer is bound by the telegram as delivered has been differently decided. The loss caused by the acceptance of an offer thus erroneously supposed to have been made must fall in the first instance upon either the sender or the receiver, leaving to the party upon whom it

¹ *Trevor v. Wood*, 36 N. Y. 511; *Strobridge Co. v. Randall*, 73 Fed. R. 619. The contract is completed at the place where the telegram of acceptance was dispatched. *Cowan v. Connor*, L. R. 20 Q. B. D. 640. The message sent to be transmitted is the original and not the one delivered. *Smith v. Easton*, 54 Md. 138. To the contrary: *Morgan v. People*, 59 Ill. 58; *Nickerson v. Spindell*, 164 Mass. 25. See *Anheuser-Busch Ass'n. v. Hutmacher*, 127 Ill. 652; 4 L. R. A. 575, making a distinction between a telegram sent in reply to another and one in which the sender takes the initiative.

² *Haas v. Myers*, 111 Ill. 421.

falls such redress as he may have against the telegraph company making the alteration.

Some cases hold that as between sender and receiver, the party who selects the telegraph as the means of communication makes it his agent, and should bear the loss, provided there be nothing in the nature of the mistake to cause the receiver to suspect an error.³

The correct doctrine, however, appears to be that of other decisions which hold that an offeror is not bound by an altered telegram, because it does not express his will, and the telegraph company is not an agent with power to create a contractual liability for him by its negligent act.⁴ It cannot be said that the sender of a telegram assumes all risk of error by adopting a customary and in some cases necessary method of communicating his offer. If he was at fault in not causing his message to be repeated, the addressee was equally at fault. The telegraph company is in no sense an agent; it is merely the vehicle of transportation hired to do certain work, and with no authority beyond the scope of its employment. The offeror is not bound by the telegram as delivered, because he never gave his assent to it, nor by the telegram as originally written, because it was never communicated.

³ *Ayer v. Western U. Tel. Co.*, 79 Me. 493; *Western U. Tel. Co. v. Shotter*, 71 Ga. 760; *Haubelt Bros. v. Rea Mill Co.*, 77 Mo. App. 672. There are *dicta* to the same effect in *Saveland v. Green*, 40 Wis. 431; *Durkee v. Ry. Co.*, 29 Vt. 127; *Anheuser-Busch Co. v. Huttmacher*, 127 Ill. 652; *Howley v. Whipple*, 48 N. H. 487; *Basons v. Brown*, 25 Kans. 410. As to knowledge by the receiver that there was a mistake in the message, see *Germain Fruit Co. v. W. U. Tel. Co.*, 137 Cal. 598; 59 L. R. A. 575.

⁴ *Pepper v. Tel. Co.*, 87 Tenn. 554; 4 L. R. A. 660; *Pegram v. W. U. Tel. Co.*, 100 N. C. 28; *Henkel v. Pape*, L. R. 6 Ex. 7. See also *Postal Tel. Co. v. Schaefer*, 110 Ky. 915; *Harrison v. W. U. Tel. Co. (Tex.)*, 10 A. & E. Corp. Case, 600.

According to Valery (*op. cit.*), p. 391, neither of these two views is correct, but the cause of the error is to be considered. If it was owing to the negligence of a party, he should bear the loss. The failure to take a customary precaution which would have prevented the mistake is negligence, and there should therefore be no general absolute rule. He refers to a case decided by a Cologne Court in 1856. A., in Cologne, telegraphed an order to a banker in Frankfort to buy certain shares of stock to an amount of more than 200,000

The question whether a telegram accepting an offer, which is changed in the course of transmission to a refusal, makes a contract or not, does not seem to have been presented to the Courts.

florins. When delivered the telegram directed the banker to *sell* the shares. The sender used the word *erkaufen*, which was changed into *verkaufen*. It was ruled that the sender was liable for the loss resulting to the banker, because the telegraph company was the former's agent. Valery contends that he was liable, not for this reason, but because he was negligent in using a word so easily altered. If he had used the word *kaufen* the mistake would probably not have been made. He refers to another case, in which the sender wrote a telegram ordering 500 kilogrammes of merchandise. The message as delivered was for 5,000. The sender was liable because he used figures instead of words, and thus facilitated the mistake.

CHAPTER II

CONSIDERATION

§ 25. **Introductory.** The rule of English and American law is that a consideration is requisite for the validity of every simple contract. The only contracts originally enforced at common law were contracts under seal and contracts executed on one side where the defendant had received a benefit for which he refused to pay. It was not until the sixteenth century that it was settled that an action would lie for the non-performance of a promise. Before that time an action in the nature of tort would lie for a malfeasance or misfeasance in performing a promise, and this doctrine was extended by that kind of action of trespass on the case called *assumpsit* to a mere nonfeasance, *i. e.*, to the breach of a promise. This theory, however, would have made all promises actionable, and in order to establish the doctrine upon a reasonable basis it was laid down in the first instance that only those promises were actionable where the promisor had received a benefit, or, in other words, where there had been a *quid pro quo*. It was presently felt that a party who relied upon another's promise and suffered a detriment or loss in consequence should have an action, although the party promising had himself received no benefit. And therefore "a larger view was taken of consideration, and it was expressed in terms of detriment to the promisee. This change was a change in the substantive law."¹ In the modern doctrine of consideration the central conception is that of some act or forbearance on the part of the promisee, while originally it was that of some benefit enjoyed by the promisor.

§ 26. **Definitions—Act or Promise.** The consideration for a promise is the legal basis upon which its enforceability

¹ Holmes, *The Common Law*, 271, 268, 287. See also as to the history of consideration Anson on Contracts, ch. 2; Pollock on Contracts, ch. 4.

rests. It is a promise made, or an act done, or forbore by the person to whom the promise is made, contemporaneously with the promise. That promise is given concurrently, in exchange for the act or forbearance or counter promise. A consideration is accordingly defined to be "any benefit to the promisor or any loss, trouble or inconvenience to, or charge upon, the person to whom his promise is made."¹

"The consideration of a contract is the *quid pro quo*, that which the party to whom the promise is made does or agrees to do in exchange for the promise."²

"Any act of the plaintiff from which the defendant derives a benefit or advantage, or any labor, detriment or inconvenience sustained by the plaintiff, provided such act is performed or such inconvenience suffered by the plaintiff with the consent, either express or implied, of the defendant."³

"A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."⁴

When a person does, forbears or promises something in exchange for a promise made to him, that is technically called the *detriment* to the promisee, since it is something that he was not bound to do but does in reliance upon the promise. A father told his son that if the latter would buy a certain factory, he would contribute \$5,000 towards the price. Relying on this promise, the son bought the mill, but his father died before making the payment. It was considered that this promise was enforceable against the father's estate, since it was supported by a detriment to the promisee.⁵ An uncle promised his nephew to pay the expenses of the latter's European tour, and the nephew, relying upon

¹ Emerson v. Slater, 22 Howard, 43.

² Phoenix Ins. Co. v. Raddin, 120 U. S. 197.

³ This is the definition in Selwyn's Nisi Prius, 8th ed., p. 47, adopted in Laythorp v. Bryant, 3 Scott, 250, and Carhill v. Carbolic Smoke Ball Co. [1893], 1 Q. B. 271.

⁴ Currie v. Misa, L. R. 10 Exch. 162, cited in Anson, Contr. 87.

⁵ Steele v. Steele, 75 Md. 477, citing Skidmore v. Bradford, L. R. 8 Eq. 134, which is in point.

the promise, made the trip, expending his own money, and it was held that he was entitled to recover that sum from the estate of his uncle.⁶

But when a man agrees to buy a thing which is in fact his own property, the promise is without consideration.⁷ In such case, there is no detriment to the promisee because he only does what he was already bound to do when he surrenders to the true owner his property. There is no benefit to the promisor because he gets nothing more than he was entitled to in consequence of his promise. So a promise not to foreclose a mortgage, which is due, is without consideration, because in such case there is neither benefit to the promisor nor detriment to the promisee.⁸

When the promise is given in exchange for an act or forbearance, the consideration for it is said to be executed. When the promise is given in exchange for a counter-promise, the consideration is called executory. In the former case, the consideration is present, and is either an act for a promise or a promise for an act. In the latter, it is something to be done in the future. Strictly speaking, however, every consideration is executed, since the giving of a promise is in legal effect the same thing as the doing of an act. The so-called past consideration is explained subsequently.

Good and valuable consideration. The consideration as above explained is called valuable. A good consideration, which is defined to be that of blood or natural love and affection, as when a man grants an estate to a near relation, is sufficient in a deed or gift, but not in an executory contract.⁹ This so-called good consideration supports the deed

⁶ *Devecmon v. Shaw*, 69 Md. 199.

⁷ *Fink v. Smith*, 170 Pa. 124. So a promise to give up property wrongfully withheld from the owner is not a consideration. *Crosby v. Wood*, 6 N. Y. 369; *Cowper v. Green*, 7 M. & W. 633. This of course does not apply to a promise by a third person to procure the return of stolen property. *Schirm v. Wieman*, 103 Md. 541.

⁸ *Gaither v. Slack*, 89 Md. 727.

⁹ *King v. Thompson*, 9 Pet. 204; *Dugan v. Gittings*, 3 Gill, 138.

as an executed transfer, but as against creditors it is merely voluntary.¹⁰

§ 27. **Benefit to Promisor or Detriment to Promisee.** It will be noticed that the definitions of consideration given in the preceding section all speak of it as either a benefit to the promisor or a detriment to the promisee. But some modern writers upon the law of contract deny that benefit to the promisor can constitute a consideration, and assert that detriment to the promisee is the essential and invariable test of the existence of a consideration. So Pollock speaks of an agreement lacking "the necessary element of detriment to the promisee."¹ It is maintained that the definition of consideration as being either a benefit to the promisor *or* detriment to the promisee "is a statement of the past history of consideration rather than of the present doctrine."²

In the vast majority of contracts, both these elements exist. Men do not make promises which induce other persons to act without at the same time themselves receiving a benefit. But it is also indubitable that a man cannot avoid liability upon his promise on the ground that the thing done by the other party, who relied upon it, was of no benefit to him. Very frequently the performance of a contract confers no benefit on the promisor, but has caused some labor or inconvenience to the promisee. There are, however, certainly some valid contracts where there is no detriment to the promisee but only a benefit to the promisor. Thus when one promises to carry out an existing contract he has already made with a third person, many cases hold that the promise, or its performance, is a sufficient consideration for the counter-promise.³ Now in these cases, the promisee, the man who performs his existing contract, suffers no detriment in legal contemplation, since he only does what he was legally bound

¹⁰ *Swan v. Dent*, 2 Md. Ch. 111, note. Marriage is a valuable consideration. *Nail v. Maurer*, 25 Md. 532; *Michael v. Morey*, 26 Md. 239; *Shea's Appeal*, 121 Pa. 302.

¹ *Contracts*, p. 186.

² Prof. Williston, in 8 *Harvard Law Review*, 33.

³ *Post*, § 41.

to do; but the promisor receives a benefit in that he obtains assurances that something in which he is interested will be done.

It is held by some cases that the forbearance to bring a wholly groundless action at law is a consideration for a promise, because the promisor is benefited by being relieved of the annoyance of a suit.⁴ It cannot properly be said that giving up an unfounded claim is a detriment to the promisee.

So also when the owner of a patent which is in fact invalid but appears to be good, grants a right to use it in consideration of a promise of payment, that promise is enforceable if the promisor got a benefit from the supposed monopoly; otherwise it is not.⁵

It is true that the law, like Saturn, often devours its own children, as von Jhering says. But it does not appear that the old rule, that consideration may be chiefly a benefit to the promisor has been wholly annulled, or superseded.

§ 28. **Moving from the Promisee.** The rule in England and in one or two States is that the consideration must move from the promisee. So it has been said, that "consideration means something of some value in the eye of the law moving from the plaintiff."¹ This means that a promise by A. for a consideration furnished by B. to do something for the benefit of C. is invalid.—in other words, that a third person cannot sue upon a contract made for his benefit, because he is a stranger to the consideration. It will be shown subsequently that the rule in America generally is that contracts made for the benefit of third persons are enforceable by them, and consequently it is not necessary that the consideration should move from the promisee.²

⁴ *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449, and cases *post*, § 37.

⁵ *Kinsman v. Parkhurst*, 18 How. 289; *Marston v. Swett*, 82 N. Y. 527; *Saltus v. Belfow Co.*, 133 N. Y. 499.

¹ *Thomas v. Thomas*, 2 Q. B. 851.

² See *post*, Part iii, ch. 2. A promise of this kind is distinguishable from a promise made directly by A. to C. upon a consideration furnished by B. It is said in 15 *Harvard Law Rev.* 771, that the

§ 29. **Adequacy of Consideration.** It is "an elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration."¹

If the Courts should pass upon the question of the adequacy of the consideration for the promise, it is obvious that they would be engaged in fixing prices and making bargains for the parties, a proceeding which would violate the fundamental principle, that there should be the utmost liberty in the making of contracts. Men are not wards of the Courts nor are they under legislative tutelage. They are presumed to be capable of making their own bargains. On the other hand, if an illusory consideration were sufficient to support a promise, then the rule requiring the existence of a consideration would have no force. Therefore the law requires it to be real; *i. e.*, something of value. There may be a qualitative but not a quantitative analysis of consideration. A stipulation in consideration of one dollar is just as effectual and valuable as a larger sum stipulated for and paid.²

When a thing is to be done by the plaintiff, be it ever so small, this is a sufficient consideration to support a promise to pay for it.³ The contracting parties must determine for

validity of such a promise is an open question; but it would seem that there should be no doubt but that it is good in those States where contracts for the benefit of third persons are enforced.

¹ *Westlake v. Adams*, 5 C. B. N. S. 265. And see *Earle v. Peck*, 64 N. Y. 569. Under the Civil Code of Louisiana, art. 1860, lesion is the injury suffered by one who does not receive a full equivalent for what he gives in a commutative contract. The remedy for this injury is founded on its being the effect of implied error or imposition, for, in every commutative contract, equivalents are supposed to be given and received. In the sale of land lesion beyond a moiety entitles the party to rescission. *Ware v. Couvillion*, 112 La. 43.

² *Lawrence v. McCalmont*, 2 Howard, at p. 452. It has been said, however, that this rule does not apply to a mere exchange of sums of money or coin, whose value is exactly fixed and where the element of time is of no importance. Therefore a promise to pay \$600 for one cent has been held to be void, unless the one cent has an extrinsic value as a rare or unique coin. *Schnell v. Nell*, 17 Ind. 29. And the consideration of one dollar paid has been held insufficient to support a promise to pay \$1,000 at a future period. *Shepard v. Rhodes*, 7 R. I. 470. This theory underlies the laws against usury.

³ *Hannan v. Towers*, 3 H. & J. 147; *Haines v. Haines*, 6 Md. 435; *Beatty v. Lamb*, 112 Pa. 480.

themselves the value and benefit of the consideration as of the other constituents of their contract.⁴ The release of a supposed right of dower which the parties think necessary to confirm a title is a consideration for a promissory note.⁵ If a man is appointed guardian on the ground that he agrees not to claim any compensation, the appointment is a sufficient consideration for the promise.⁶ The renunciation of the right to administer by one executor is a consideration for a promise by the other to divide the commissions with him.⁷ A promise by a party to serve as administrator of an estate without compensation is valid and based upon a sufficient consideration when the persons to whom the promise is made waive their right to administer and become sureties on the bond of the party making the promise.⁸

Gross inadequacy of consideration is, however, in many cases treated as evidence of fraud.⁹

In equity, inadequacy of consideration is a ground for refusing specific performance or other equitable relief to a party seeking to enforce a promise.¹⁰

§ 30. **Gratuitous Promises.** When the loan of an article is made, or when a thing is delivered to one who agrees gratuitously to take charge of it or to do something with it—in other words, in the bailments of *depositum*, *madatum* and *commodatum*—after the article has once been delivered there is a duty imposed on the receiver to exercise due care, although his promise to receive it could not have been enforced for lack of consideration. It is generally said that

⁴ Taylor v. Turvey, 33 Md. 505.

⁵ Sykes v. Chadwick, 18 Wallace, 141.

⁶ State v. Baker, 8 Md. 44.

⁷ Ohlendorff v. Kanne, 66 Md. 495. See also Bassett v. Miller, 8 Md. 548.

⁸ Mott v. Fowler, 85 Md. 676.

⁹ Walker v. Shepard, 210 Ill. 112; Coffey v. Sullivan, 63 N. J. Eq. 296.

¹⁰ Geiger v. Green, 4 Gill, 472; Smoot v. Andrews, 19 Md. 398; Robinson v. Robinson, 4 Md. Ch. 176; Lawson v. Mullinix, 104 Md. 156. But a subsequent change in the value of property will not be considered. Cochran v. Pascault, 54 Md. 1.

this implied promise to use care is based upon the consideration of detriment to the promisee who parted with possession upon that understanding.¹ It is in fact a duty imposed by law as resulting from the inherent nature of the transaction.

But also when no article is delivered, but one undertakes to perform a voluntary service for another he is liable for damage resulting from his negligence in doing it.² A newspaper advertised that it would answer inquiries from readers desiring financial advice, and the plaintiff asked for the name of a "good stockbroker." The newspaper recommended to him a person who was an outside broker; *i. e.*, not a member of the Stock Exchange, and who was in fact an undischarged bankrupt. Plaintiff entrusted his funds to this person, who made way with them. It was held that there was a contract, based on a consideration, between the plaintiff and the proprietors of the newspaper which "did not amount to a warranty of the character or conduct of the broker named, but did amount to a contract to take reasonable care in the nomination of a broker," and that there was a clear breach of this contract.³

A person who voluntarily undertakes to invest money for another and acts negligently or disregards the instructions given to him, is liable for a loss thereby caused.⁴

§ 31. **Various Considerations.** A promissory note for \$10,000 executed in consideration of the promisee's naming his child after the promisor has been held to be enforce-

¹ *Prince v. Ala. State Fair*, 106 Ala. 340; 28 L. R. A. 716; *Schermer v. Neurath*, 54 Md. 491.

² In *Anson on Contracts*, 98, it is said: "To find the ground of this liability we must go back to the time when the Courts gave damages for the misfeasance of an undertaking, although they would not recognize a non-feasance. The right does not arise until the services have been entered upon, and rests on the broad ground stated by Willes, J., in *Skelton v. L. & N. W. Ry. Co.*, L. R. 2 C. P. 636, 'If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it.'"

³ *De la Bere v. Pearson* [1908], 1 K. B. 280.

⁴ *Williams v. Higgins*, 30 Md. 408; *Isham v. Post*, 141 N. Y. 100; 23 L. R. A. 90. *Cf. Watson v. Feigner*, 208 Ill. 144.

able.¹ "When one party," said the Court in this case, "agrees for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy or express his appreciation of services another has done him, his estimate of the value should be left undisturbed unless indeed there is evidence of fraud. There is in such a case absolutely no rule by which the Courts can be guided if once they depart from the value fixed by the promisor." The promise by A. that if B. will marry and have a child by his wife, he will pay him a certain sum, is a valid contract, and upon the happening of the contingency B. is entitled to recover the amount promised.² A promise by a husband and wife that if another's child would stay with them until of age, they would care for him and leave him their property, is valid.³

An uncle promised to pay his nephew \$5,000 if the latter would "refrain from drinking liquor, using tobacco, swearing and playing cards or billiards for money until he should become twenty-one years of age." Upon the performance of his part of the agreement by the nephew, it was held that he was entitled to recover the promised sum from the executor of his uncle.⁴ An aunt said to her nephew: "I will give \$500 if you will come to my funeral." He promised to attend, and it was held to be a valid consideration, being a promise for a promise.⁵

Changing one's name at the request of another is a consideration for a promise to leave a legacy.⁶ A promise to render services in the future supports a promise to pay for past services, as well as those to be rendered.⁷ An agreement by the shopkeepers in a certain town to close their

¹ *Wolford v. Powers*, 85 Ind. 294.

² *Garvin v. Cromatie*, 11 N. C. 174.

³ *Neal v. Gilmore*, 79 Pa. 421. But see *Wood v. Evans*, 113 Ill. 186.

⁴ *Hamer v. Sidway*, 124 N. Y. 538; 12 L. R. A. 463. See also *Lindell v. Rokes*, 60 Mo. 249.

⁵ *Earle v. Angell*, 157 Mass. 294. It might be questioned in such case whether there was an intention to create a legal relation.

⁶ *Babcock v. Chase*, 92 Hun, 267.

⁷ *Graham v. Stanton*, 177 Mass. 350.

shops at a certain hour in summer is supported by the mutual promises⁸

Where the parties to a pending cause agree to waive their right to a jury trial and submit it to the determination of the Judge, the respective promises are the consideration for each other.⁹

Where the plaintiff attended a certain school at the instance of the defendant, who promised to pay the school fees, the promise is supported by a valuable consideration.¹⁰

§ 32. **Consideration and Motive.** If a man makes a promise which is supported by such a consideration as has been explained to be sufficient, the law does not inquire into his motive for making it. His real motive may be one thing and what the law regards as the consideration something quite distinct.¹ The motive of an agreement is the particular circumstance or reason which induces a party to contract. It makes no difference whether this motive was true or false, good or bad, except in cases concerning the reality of consent, such as fraud or mistake. The consideration is the particular circumstance which causes a promise to be binding. This has nothing to do with the motive of the promisor in making the promise. When you ask a medical man to attend your servant, who is ill, your motive may be one of humanity, or it may be a desire not to lose a good cook, or it may be merely to avoid the annoyance of having him die in your house. The law does not concern itself with your motive. The consideration for your promise to pay the physician is that he attended your servant at your request.

Sometimes the law attributes to an external fact the power of making a promise binding. That act or fact is the efficient cause of the obligation. This is the case with formal contracts, as will be explained in the next chapter.

⁸ *Stovall v. McCutchen*, 107 Ky. 580; 47 L. R. A. 287.

⁹ *Lanahan v. Heaver*, 77 Md. 609.

¹⁰ *Young v. Boyd*, 107 Md. 449.

¹ See *Philpot v. Gamminger*, 14 Wallace, 570.

§ 33. **Moral Obligation.** It was formerly held that when a man was under a moral obligation, which no Court of law or equity would enforce, and promised, the honesty and rectitude of the thing was a consideration.¹ The word "obligation" in this connection is not used in its technical sense, as corresponding with a legal right, but rather as the motive of a promise.

These cases have long since been overruled, and it is now well established that a moral obligation, arising from past benefits or from a pious wish to fulfill a duty, dictated by gratitude or benevolence, but such as the law does not enforce, is not a consideration for a promise.² If you should say to a man,—I was anhungered and you fed me, I was naked and you clothed me, and now that you have yourself fallen upon evil days, I promise to give you \$100,—that promise is invalid because without a consideration. It is not given in exchange for an act, forbearance or counter-promise on the part of the promisee. So the moral obligation of a son to pay for the support of his mother is not a consideration for his promise to reimburse a person who had provided for her without his request.³

But when there has been some pre-existing legal obligation which cannot be enforced on account of the statute of limitations or a discharge in bankruptcy, etc., or when there was some duty which a Court of equity would enforce, in such cases an express promise to pay affords a remedy at law.⁴

¹ *Hawkes v. Saunders*, Cowper, 289, per Lord Mansfield; *State v. Reigart*, 1 Gill, 1; *Drury v. Briscoe*, 42 Md. 162.

² *Eastwood v. Kenyon*, 11 Ad. & E. 438; *Ingersoll v. Martin*, 58 Md. 75; *Linz v. Schuck*, 106 Md. 220; *Parsons v. Teller*, 188 N. Y. 318; *Hart v. Strong*, 183 Ill. 349. In a few States a moral obligation is considered sufficient to support a promise. *Anderson v. Best*, 176 Pa. 498. A promise to pay for services rendered under a void contract was held to be supported by the moral obligations in *Muir v. Kane*, 55 Wash. 131; 26 L. R. A. (N. S.) 520. To the contrary is *Bagnole v. Madden*, 76 N. J. L. 255. Many cases relating to moral obligation as a consideration are collected in the notes to *Muir v. Kane*, *supra*, and *Trimble v. Rudy*, 53 L. R. A. 353.

³ *Davis v. Anderson*, 99 Va. 620; *Inhabitants of Freeman v. Dodge*, 98 Me. 531; 66 L. R. A. 396.

⁴ *Callahan v. Linthicum*, 43 Md. 97; *Condon v. Barr*, 49 N. J. L. 53; see *post*, § 46.

Whether a promise by a woman after becoming a widow to pay a debt contracted during marriage, when the obligation was void, is enforceable or not has been differently decided. But the weight of authority is in favor of the view that, since her original contract was not merely voidable or unenforceable but was absolutely void, her subsequent promise is based merely on a moral obligation and is therefore invalid.⁵

Other illustrations of the inadequacy of a moral obligation are subsequently set forth in the discussion of past considerations.

§ 34. **Subscriptions.** In the case of a voluntary subscription for a charitable, religious or educational purpose, some few cases hold that the mutual promises of the subscribers are the consideration for each other, being in the nature of contracts for the benefit of a third person.¹ This ruling is clearly inconsistent with the real nature of the transaction. The subscribers do not promise each other. Another view is that the person or corporation to which the subscription is given impliedly agrees to use the fund for some particular purpose and this implied promise supports the promise of the subscriber.²

But the prevailing doctrine and the only one consistent with the theory of consideration is that a voluntary subscription is not enforceable unless money has been expended, or liability incurred, or some work done, upon the faith of it.³

⁵ *Meyer v. Howarth*, 8 A. & E. 467; *Musick v. Dodson*, 76 Mo. 624; *Kent v. Rand*, 64 N. H. 45. *Contra*: *Goulding v. Davidson*, 26 N. Y. 604; *Holden v. Banes*, 140 Pa. 63.

¹ *Christian College v. Hendley*, 49 Cal. 347; *Baptist University v. Borden*, 132 N. C. 500; *Wilson v. First Church*, 56 Ga. 554.

² *Helfenstein's Estate*, 77 Pa. 328; *Irwin v. Webster*, 56 Ohio, 9; 36 L. R. A. 240; *Simpson Centenary College v. Bryan*, 50 Iowa, 293; *Troy Academy v. Nelson*, 24 Vt. 189; *Albert Lea College v. Brown*, 88 Minn. 532; 60 L. R. A. 873.

³ *Gittings v. Mayhew*, 6 Md. 114; *First Presby. Church v. Cooper*, 112 N. Y. 517; 3 L. R. A. 468; *Board of Foreign Missions v. Smith*, 209 Pa. 361; *Cottage St. Church v. Kendall*, 121 Mass. 528; *Martin v. Miles*, 179 Mass. 114; *Pratt v. Baptist Society*, 93 Ill. 475; *Beatty v. Western College*, 177 Ill. 280; *Richelieu Hotel Co. v. Internat.*

§ 35. **Promise as a Consideration—Mutuality.** A promise to do or forbear is a sufficient consideration, and in an executory contract, the reciprocal promises are the consideration for each other. For instance, a promise to manufacture articles is binding because it is supported by the counter promise to pay for them when made. An agreement between the first and second endorsers of an accommodation paper to share a loss equally between them is enforceable.¹

When the contract is executory; *i. e.*, when something remains to be done on both sides, although there may have been a part performance on one side, an agreement of the parties to rescind and end it is effectual, because the reciprocal promises of release support each other. But after a contract has been fully performed on one side, an agreement to rescind it and release the other party from the obligation to perform on his side would be without consideration.² So

Co., 140 Ill. 248. The liability must be incurred before the death of the subscriber, for that revokes his offer. *Twenty-third St. Church v. Cornell*, 117 N. Y. 604; 6 L. R. A. 807. It is said in some cases that a subscription conditioned upon the collection by the promisee of a certain sum within a designated time is binding when that is done. *Kentucky Ed. Society v. Carter*, 72 Ill. 47; *La Fayette County v. Magoon*, 73 Wis. 627; 3 L. R. A. 761. And see *Robinson v. Nutt*, 185 Mass. 345, where it was held, according to the Syllabus: "An agreement in writing to pay to the sinking fund committee of a certain parish \$5 in each month for five years in order to help in the payment of the debt of the parish, on condition that the whole amount of \$10,000 shall be in like manner subscribed or otherwise provided for and other requirements be performed, is a formal offer, which, on performance of the conditions by the committee, becomes binding, such performance being a good consideration for the subscriber's promise." But in *Keuka College v. Ray*, 167 N. Y. 100, it is said that those agreements "which are conditioned merely upon all subscriptions for a like purpose aggregating a certain amount by a certain day are deemed to lack a legal consideration to make them enforceable. The doctrine, however, may be regarded as well established that if money is promised to be paid upon the condition that the promisee will do some act or perform certain services, then the latter, upon performance of the conditions, may compel payment."

¹ *Philips v. Preston*, 5 Howard, 278.

² *Kidder v. Kidder*, 33 Pa. 268; *Foster v. Dawber*, 6 Exch. 839, 851; *Williams v. Stern*, L. R. 5 Q. B. D. 296. But under some circumstances an agreement *before* breach to rescind a unilateral contract is valid without consideration. See *post*, Part vi, ch. 1.

a promise to extend the time of payment for a debt is without consideration.³

A promise is not a consideration unless it be, first, a promise to do something which the promisor was not already bound to do, and, secondly, a promise which is legally enforceable. This first requisite of the promise has certain limitations and exceptions which will be considered in succeeding sections. As to the second, it is obvious that an unenforceable promise is an illusory consideration, and hence is of no value in the eye of the law. A promise may be unenforceable because lacking in certainty and definiteness, as previously explained in connection with offer' and acceptance, or because its performance is left to the arbitrary choice of the promisor. Your promise to do work for me is not supported by a consideration if my counter promise is to pay you for it if I should choose to do so.⁴

Unless a man acts as agent, etc., of another, he cannot promise except for himself, and consequently a promise that a third person will do a certain thing is of no value in the eye of the law, since he cannot bind the third person and does not intend to bind himself. When negotiations take place between two persons concerning an act or forbearance to

³ *Olmstead v. Latimer*, 158 N. Y. 313; 43 L. R. A. 685; *Hoffman v. Coombs*, 9 Gill. 284; *Ives v. Bosley*, 35 Md. 262; *Nightingale v. Meginnis*, 34 N. J. L. 461. It is said in *Parmelee v. Thompson*, 45 N. Y. 58, approved in *Olmstead v. Latimer*, *supra*, that a promise to part interest in the future is not a consideration for a promise to extend the time of payment of the principal. See to same effect, *Abell v. Alexander*, 45 Ind. 523; *Wilson v. Powers*, 130 Mass. 127. But the correct view is that of other Courts which hold that such an agreement has a consideration in that the debtor agrees not to discharge the debt until the expiration of the extended time, which he would otherwise have a right to do. *Reynolds v. Barnard*, 36 Ill. App. 218; *Simpson v. Evans*, 44 Minn. 419; *Fawcett v. Freshwater*, 31 Ohio, 637; *Shepherd v. Thompson*, 98 Ky. 668.

⁴ *Vogel v. Pekoc*, 157 Ill. 339. See *post*, Part v, ch. 1. It was held in *Newhall v. Journal Printing Co.*, 105 Minn. 44, that a contract of employment which provides that either party may terminate it upon giving written notice is not lacking in mutuality. A note appended to this case in 20 L. R. A. (N. S.) 899, collects some cases on mutuality in contracts of employment.

be done by a third person, in which one of them has an interest, it may happen that one party promises that the third person will do the act. This promise may be made in two different ways: The promisor may intend really to procure the performance of the act, or if not to pay the damage resulting from the non-performance. This is the case when one becomes a guarantor or surety for the third person, by promising to indemnify the promisee if the third person fails to perform. But if one simply promises to see to it that a third person does a certain act, without a guarantee that he will do it, therefore without intending to bind himself, such a promise does not create an obligation. It is in each case a question of the interpretation of the agreement⁵.

The general rule is that in a bilateral contract, where a promise is given for a promise, both parties must be bound or neither is bound⁶. If A. offers to supply B. with goods at designated prices and B. merely accepts the offer without promising to order any, or without promising to buy what he may need from A., there is no contract, because there is no obligation on the part of B. This agreement is merely an offer, and a contract is made only by ordering goods, and that before revocation.⁷ Where a man agreed with the Government to print and bind certain public documents at specified prices for a term of years, but the Government did not agree to give him all or any of the work in question, it was held that no contract had been made.⁸

⁵ *Huc*, *Comm.* vii, n. 42.

⁶ *Balto. & Ohio R. Co. v. Potomac Coal Co.*, 51 Md. 327; *Benjamin v. Bruce*, 87 Md. 240; *Am. Agric. Co. v. Kennedy*, 103 Va. 171; *Emerson v. Pacific C. Co.*, 96 Minn. 1.

⁷ *Chicago, &c., Ry. Co. v. Dane*, 43 N.Y. 240; *Thayer v. Burchard*, 99 Mass. 508. But see *Great Northern Ry. Co. v. Witham*, L. R. 9 C. P. 16. In *Cold Blast Co. v. Kansas City Bolt Co.*, 114 Fed. 77; 57 L. R. A. 698, A. wrote a letter saying, "We offer to deliver at your works during six months from Nov. 1, 1898, the following materials at the prices stated." etc. B. accepted merely without more, and gave orders which were filled and paid for. Afterwards A. refused to make further deliveries. It was held that there was no contract because B. did not promise to order any materials.

⁸ *Reg. v. Demers* [1900], App. Cas. 103.

Contingent Contracts. But when the offer to supply goods is accepted by a promise to buy from the offerer all that the promisor may need of the goods in question within a certain time at a price fixed then, or at the future market price, or when the offer is to sell to the other party all the articles of a certain kind that the offerer may have to dispose of, a valid contract is made.⁹ Where A. agreed to sell and B. promised to buy all the ice necessary for the conduct of the latter's business for five years, the contract was held to be mutual, and the quantity to be taken was measured by the necessities of the business.¹⁰ An agreement by A. to furnish B. with "all the roll rag paper that he may need" during a year is valid, although B. does not expressly agree to take any, if he has an established business and will need some.¹¹ Rust wrote to Higbie, saying: "I will send you what 5 lb. jelly pails you may want at forty cents doz. f. o. b." Higbie accepted and gave some orders which were filled and another which was not. The Court said that, "the contract is lacking in mutuality. By its terms, Rust would be obligated to sell, but Higbie would not be obliged to buy. The fact that Higbie was an extensive dealer in pails, supplying many customers, does not alter the situation. He might elect to sell no 5 lb. jelly pails whatever, or to purchase all he should sell from some person other than Rust. There was no agreement on Higbie's part to take or want any pails whatever."¹²

In this case, it was said that such an agreement is void for lack of mutuality when there is no promise on the part of the buyer to take or need any quantity whatever and no method exists by which it can be determined whether he will

⁹ *Lima Locomotive Co. v. Nat. Steel Co.*, 155 Fed. 77; 11 L. R. A. (N. S.) 713, and cases in note. As to certainty in such contracts and their effect generally, see *ante*, § 12. There can be no recovery for breach of such a contract by the proposed purchaser without proof that supplies were needed and that plaintiff sustained a loss in not being allowed to furnish them. *Grant v. U. S.*, 7 Wallace, 331.

¹⁰ *Hickey v. O'Brien*, 123 Mich. 611.

¹¹ *Excelsior Co. v. Messinger*, 116 Wis. 549. See also *Nat. Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Parker v. Pettit*, 43 N. J. L. 512.

¹² *Higbie v. Rust*, 211 Ill. 336.

need any of the commodity. It might very well be considered, however, that the promise of the offeree to buy whatever he may need of a certain article from the offerer is a sufficient consideration, although he does not promise to order any, since it restricts his right to buy from others in case he does need any. A contract provided that the plaintiff was to have all the hides of beef cattle slaughtered for Indians at a certain camp, which the Superintendent should decide were not required for the Indians, the number of hides to be about two thousand. None were slaughtered, but all the cattle were turned over to the Indians on foot. In an action for breach of the contract, it was held that there was no obligation on the part of the Government to slaughter any cattle, but the operation of the contract was dependent upon a contingency of which plaintiff took the risk.¹³ So when a contract was to sell to the Government 880 cords of wood, more or less, that should be determined to be necessary by a Post Commander, who notified the other party that only forty cords would be required, such determination was conclusive.¹⁴

The rule relating to mutuality of obligation has been often overworked. It is not applicable in the case of an unilateral or conditional contract.¹⁵ In the case of a contract within the Statute of Frauds, the party who signed the memorandum may be bound and the other free.¹⁶ When a contract is made between an infant and an adult, the latter is bound and the infant may avoid it.¹⁷

§ 36. **Forbearance to Sue—Compromises.** If a party promises to forbear from instituting a suit, either altogether or for a time, or agrees to compromise a suit, the question whether such promise or forbearance is a valid consideration depends upon whether that party had some ground for the right he relinquishes or forbears to exercise, and upon his good faith

¹³ *Lobenstein v. U. S.*, 91 U. S. 324.

¹⁴ *Bradley v. U. S.*, 96 U. S. 168.

¹⁵ See *post*, Part v, ch. 1.

¹⁶ *Engler v. Garrett*, 100 Md. 387.

¹⁷ See *post*, Part ii, ch. 5.

in making the claim. If he knows that he has no cause of action and threatens suit for the purpose of extortion, then a promise to pay for his forbearance is not only without consideration, but is also voidable on the ground of fraud.¹

When the claim is made in good faith, it may be either wholly unfounded, or it may have some basis and be to some extent doubtful. The cases agree that a promise to forbear the exercise of a right which appears to have some foundation, is a valid consideration, although it may as matter of fact or of law be unenforceable.² But upon the question whether a promise to forbear bringing an entirely groundless suit, although the demand is made in good faith, is a consideration or not, there is a diversity of opinion.³

The doctrine of some cases is that a forbearance to sue on an unfounded claim is not a consideration. The claim must have some color of right either in fact or law.⁴ In one case,⁵ a man forbore to sue out an attachment against a stock of goods. The proof showed that there was no ground for issuing an attachment, and the forbearance was held to be no consideration for the promise. In another case,⁶ the promise was to forbear to institute proceedings in bankruptcy against a certain man, when in point of law and fact such proceedings could not have been successfully maintained, and this

¹ *Walker v. Shepard*, 210 Ill. 112; *Zoebisich v. Van Minden*, 120 N. Y. 406.

² *Emerick v. Coakley*, 35 Md. 188; *Hanchett v. Ives*, 171 Ill. 122; *White v. Hoyt*, 73 N. Y. 505; *Polson v. Stewart*, 167 Mass. 211; 36 L. R. A. 771. But forbearance to sue on a claim arising out of an illegal contract is not a consideration. *Union Coll. Co. v. Buckman*, — Cal., —; 9 L. R. A. (N. S.) 568.

³ See note as to compromise of invalid or unfounded claims appended to *Armijo v. Henry*, 25 L. R. A. (N. S.) 276, collecting many cases.

⁴ *Enmitsburg R. Co. v. Donoghue*, 67 Md. 389; *Fink v. Smith*, 170 Pa. 124; *Feeter v. Weber*, 78 N. Y. 334; *Mulholland v. Bartlett*, 94 Ill. 58; *Woodburn v. Woodburn*, 123 Ill. 608; *Taylor v. Weeks*, 129 Mich. 233; *Petersen v. Breitag*, 88 Iowa, 422. Cf. *Fire Ins. Ass'n. v. Wickham*, 141 U. S. 383.

⁵ *Smith v. Easton*, 54 Md. 138.

⁶ *Ecker v. McAllister*, 54 Md. 362, 373. See *Ecker v. Bohn*, 45 Md. 278, and *Ecker v. McAllister*, 45 Md. 290, to the same effect.

too was held to be no consideration. In *Schroeder v. Fink*,⁷ the defendant was sued on a promise to pay a note, executed by his deceased father, in consideration of the plaintiff's surrendering the note and promising to give no trouble. The deceased left no estate out of which the note could have been paid, and hence there was no consideration for the defendant's promise.

The ruling of other authorities is that the forbearance to sue on a claim made in good faith, or the compromise of such a claim, is a sufficient consideration, although the claim be in fact wholly unfounded.⁸ In *Callisher v. Bischoffsheim*.⁹ the Court said that, if a party "*bona fide* believes that he has a fair chance of succeeding, he has a reasonable ground for suing and his forbearance to sue will constitute a good consideration. When such a person forbears to sue, he gives up what he believes to be a right of action and the other party gets an advantage, and instead of being annoyed with an action, he escapes the vexations incident to it."

If a claim for a sum of money alleged to be due by a third person is assigned to one who believes it to be valid, and the assignee agrees with the third person to give up his right to demand certain property upon the faith of that person's promise to pay the claim, then the question whether the claim was originally valid or not is immaterial, and the surrender by the assignee of his right to the property is a consideration for the promise to pay the claim.¹⁰

Actual forbearance to sue in reliance on the promise made in consideration of it is sufficient. It is not necessary that

⁷ 60 Md. 436. See also *Gist v. Cockey*, 7 H. & J. 135; *Busby v. Conoway*, 8 Md. 55.

⁸ *Wahl v. Barnum*, 116 N. Y. 87; *Bowers Dredging Co. v. Hess*, 71 N. J. 327; *Prout v. Pittsfield Div.*, 154 Mass. 450; *Ostrander v. Scott*, 161 Ill. 339. *Cf.* *Union Bank v. Geary*, 5 Peters, 99.

⁹ L. R. 5 Q. B. 449, per Cockburn, C. J. In *Ex parte Banner*, L. R. 17 Ch. D. 480, Brett, L. J., doubted whether giving up what was clearly an unfounded cause of action would support a compromise. But in *Miles v. New Zealand Co.*, L. R. 32 Ch. D. 266, it was said that *Callisher v. Bischoffsheim* was the law of the Court.

¹⁰ *Alexander v. Md. Trust Co.*, 106 Md. 170.

there should be an express promise to forbear.¹¹ In *Bowen v. Tipton*,¹² A. had a *bona fide claim* against C. and put it in the hands of a lawyer for collection. The lawyer exhibited it to C. and to B., his father, and told him of the suit he was instructed to institute. Thereupon B. took from his son a bill of sale of the latter's property. After hearing of this, A. called upon B. and said, "that he was going to send the sheriff up that day; that he was not going to stop for the bill of sale, it was all a fraud." B. replied, "You keep quiet, and you will have your money; I guess I am worth it." A., relying on this promise, directed that further proceedings be stopped, and this forbearance was held to be a sufficient consideration for B.'s promise.

If there be an express promise to forbear, it need not be for a definite time. In such case a reasonable time is implied.¹³

Compromises of litigation pending is generally sustained if the suit was instituted in good faith, and the fact that there was no substantial ground for it does not render the agreement invalid for lack of consideration.¹⁴

Family compromises of disputes are especially favored, and the Courts seem to recognize the soundness of the maxim, that dirty linen should be washed at home.¹⁵ When an heir or distributee threatens to contest a will, a promise to let

¹¹ *Crears v. Hunter*, L. R. 19 Q. B. D. 341; *Edgerton v. Weaver*, 105 Ill. 43. *Contra*: *Manter v. Churchill*, 127 Mass. 31.

¹² 64 Md. 275.

¹³ *Traders' Nat. Bank v. Parker*, 130 N. Y. 415; *Howe v. Taggart*, 133 Mass. 284. But a promise to forbear for such a time as the creditor shall choose is not a consideration, as this leaves him free to proceed forthwith. *Strong v. Sheffield*, 144 N. Y. 392.

¹⁴ *McClellan v. Kennedy*, 8 Md. 230; *Feeter v. Weber*, 78 N. Y. 334; *Clark v. Turnbull*, 47 N. J. L. 265; *Gloucester Isinglass Co. v. Russia Cement Co.*, 154 Mass. 92; 12 L. R. A. 663; *Murphy v. Murphy*, 84 Ill. App. 292; *McClure v. McClure*, 100 Cal. 339.

¹⁵ *Hartle v. Stahl*, 27 Md. 157; *Chandler v. Pomeroy*, 143 U. S. 318; *Moss v. Cohen*, 158 N. Y. 240; *McDale v. Kingsley*, 163 Ill. 433; *Smith v. Smith*, 36 Ga. 184; 2 Pomeroy, Eq. Jur. § 850. Compromises in the nature of family arrangements are upheld when the same consideration between strangers would not be sufficient. *Williams v. Shipley*, 67 Md. 373.

him share in the estate if he desists is valid, provided his claim was not merely vexatious. The fact that there was no reasonable ground for the contest does not invalidate the compromise.¹⁶

When A. promises to pay a debt due by C. in consideration of forbearance on the part of a creditor of C., the promise is within the fourth section of the Statute of Frauds and must be in writing.¹⁷

It seems that if the agreement of compromise is not carried out by the payment or tender of the money, then the original cause of action is revived, and the promisee may sue either upon that or upon the new promise.¹⁸

§ 37. **Promise to do the Impossible or the Unlawful.** A promise to do a thing impossible in fact or in law is not a consideration. Impossibility in fact means an objective physical impossibility existing at the time the agreement is made.¹ If the impossibility is not obvious, then the contract may be avoided on the ground of mistake.² If perform-

¹⁶ *Blount v. Dillaway*, 199 Mass. 330; 17 L. R. A. (N. S.) 1037. See also *Grandin v. Grandin*, 49 N. J. L. 508; *Pool v. Docker*, 92 Ill. 501; note as to validity of contract not to contest probate of will appended to *Grochowski v. Grochowski*, 13 L. R. A. (N. S.) 484.

¹⁷ *Thomas v. Delphy*, 33 Md. 373.

¹⁸ *Brown v. Spofford*, 95 U. S. 483; *Early v. Rogers*, 16 How. 599. See *post* as to Accord and Satisfaction.

¹ The old case of *Thornborrow v. Whiteacre*, 2 Lord Raymond, 1164, illustrates an objective impossibility. Defendant in consideration of 2 s. 6 d. paid and £ 4, 17 s. 6 d. to be paid on performance agreed to give plaintiff two grains of rye corn on Monday, 29th March, four on the next Monday, eight on the succeeding Monday, and so on for one year, doubling on each Monday the amount delivered on the preceding Monday. It was found on calculation that the whole quantity to be delivered would be upward of half a million quarters, so that, as counsel said, all the rye grown in the world would not come to so much. The Court held that the defendant ought to be made to pay for his folly, but it is obvious that the agreement was void. With this may be compared *James v. Morgan*, 1 Levinz, 111, where a horse was sold for one barley-corn for the first nail in the shoes, two for the second, four for the third, and so on, doubling for the successive nails. A verdict for the value of the horse was directed.

² See *post*, Part I, ch. 5.

ance of a promise becomes impossible after the contract is made, it is sometimes a ground for discharge.³ But a subjective impossibility; *i. e.*, a promise to do that which is in itself possible but which the promisor cannot do, does not avoid the contract.³

A promise to do what cannot legally be done by the promisor is an illusory consideration. So an undertaking by a trustee to suspend a sale which had been decreed is not a consideration for a promise to withdraw an appeal, because the trustee had no power to suspend the sale.⁴

§ 33. **Performance of Duty—Payment of Part of Debt.** A promise to do, or actually doing, that which a man is already legally bound to do is not a consideration. Thus when the fees of an officer or of a witness are fixed by law, a promise of extra compensation is void because the counter promise to do the work or give the evidence is only a promise to do that which the promisor was already bound to do.¹ So a promise to pay an officer for making an arrest is also for this reason without consideration.²

It will be seen presently that there are certain limitations or exceptions to the generality of this rule.

Payment of smaller sums in satisfaction of larger. One application of the principle that the performance of an existing obligation is an illusory and unreal consideration is the rule, that the payment of part of a liquidated and undisputed debt, then due, is not a consideration for a promise of the creditor to accept such part payment in satisfaction of the entire debt, although the debtor was induced to make the payment by reason of the promise. This rule is well established and has a long and unimpeachable pedigree.³ When a

³ See *post*, Part vi, ch. 5.

⁴ *Ward v. Hollins*, 14 Md. 154. Cf. *Folck v. Smith*, 13 Md. 85; *Hopkins v. Hinkley*, 61 Md. 584.

¹ *Lucas v. Allen*, 80 Ky. 681.

² *Smith v. Whildin*, 10 Pa. St. 39.

³ *Pinnel's Case*, 5 Coke's Rep. 117 (1602); *Foakes v. Beer*, L. R. 9 App. Cas. 605; *Commercial & F. Bank v. McCormick*, 97 Md. 703; *Rohr v. Anderson*, 51 Md. 305; *Geiser v. Kirschner*, 4 G. & J. 305.

smaller sum than that due is paid under an agreement to accept it as full satisfaction, there must be, in order to effectuate the agreement either a consideration for giving up the residue or a release under seal or an express forgiveness of the residue of the debt.

The rule is certainly unreasonable and enables a creditor to violate his solemn promise upon the faith of which the part payment was made. It has been abrogated by statute in a few States, and in some others the Courts have refused to follow it.⁴

A sufficient consideration for giving up the residue of the debt occurs when anything which the law regards as of value is superadded to the part payment.⁵ An agreement between a debtor and creditor by which the former agrees to pay and the latter to accept a smaller sum than the amount of the debt *before its maturity* in full satisfaction is supported by a consideration.⁶ "If the obligor pay a lesser sum either before the day or at another place, than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satis-

and note; *Chicago, &c., R. Co. v. Clark*, 178 U. S. 353; *Farmers, etc., Ass'n. v. Cain*, 224 Ill. 599; *Chambers v. Niagara Ins. Co.*, 58 N. J. L. 216; *Fuller v. Kemp*, 138 N. Y. 231; 20 L. R. A. 785. It makes no difference that the creditor executes a receipt stating that the amount paid is full satisfaction. *Campbell v. Booth*, 8 Md. 115; *Bingham v. Browning*, 197 Ill. 122. But in some States effect is given to a receipt in full. *Flynn v. Hurlock*, 194 Pa. 462; *Holmes v. Holmes*, 129 Mich. 412. When a debtor to whom a receipt in full, after a part payment, has been given is thereby enabled to sell his stock of goods to a third person, the creditor is estopped to make any claim against the goods. *Ebert v. Johns*, 206 Pa. 395. It was held in *Engbretson v. Seiberling*, 122 Iowa, 522, that when the debtor is insolvent the agreement of the creditor to accept a small sum in satisfaction is valid. No reason is given for this except that the rule in question is "purely technical".

⁴ It appears that statutes have changed the rule in Alabama, California, Georgia, North Carolina and Virginia. See *Herman v. Schlesinger*, 114 Wis. 382. It was not followed in *Ford v. Hubinger*, 64 Conn. 129; *Clayton v. Clark*, 74 Miss. 499; 37 L. R. A. 771.

⁵ *Very v. Levy*, 13 Howard. 345; *Maddox v. Bevan*, 39 Md. 499.

⁶ *Chicora Fer. Co. v. Dunan.*, 91 Md. 144; *Singer v. Lee*, 105 Md. 663; *Savage v. Everman*, 70 Pa. 319.

faction.”⁷ “The gift of a horse, a hawk, or a robe in satisfaction is good. For it shall be intended that a horse, a hawk or a robe might be more beneficial to the plaintiff than money, in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction.”⁸ The guarantee of part of the debt by a third person, or the negotiable note or check of a third person for a part of the debt is a sufficient consideration for the relinquishment of the residue.⁹ An agreement by a debtor not to go into bankruptcy is a consideration to support a promise to accept a part of the debt in full payment.¹⁰ When a judgment debtor agrees to waive his right to appeal, that is a sufficient consideration to support the creditor’s promise or agreement to accept a less sum than the amount of the judgment in satisfaction.¹¹

If there be a *bona fide* dispute as to the amount of the debt, or as to the right of the debtor to a set-off or rebate, then an agreement to accept less than the full amount is valid, although the debtor’s claim be invalid.¹² When there is such a controversy, then if the debtor sends to the creditor a check for a smaller sum than that demanded, stating that it is in full settlement for the claim and that if the offer is not accepted, the check is not to be used, the use of such check by the creditor constitutes an accord in satisfaction by which his entire claim is extinguished, although at the time of receiving it he declares that he does not accept it in full satisfaction but only in part payment.¹³ If in such case,

⁷ 2 Co. Litt., tit. Est. Con. 212 b.

⁸ Pinnel’s Case, 5 Coke’s Rep. 117.

⁹ Maddox v. Bevan, 39 Md. 499; Jaffray v. Davis, 124 N. Y. 164; 11 L. R. A. 710; Kemmerer v. Kokendifer, 65 Ill. App. 31.

¹⁰ Melroy v. Kemmerer, 218 Pa. 381; 11 L. R. A. (N. S.) 1018; Dawson v. Beall, 68 Ga. 328. A conveyance by the debtor of absolute title to property held by the creditor as collateral security is a consideration for the promise to accept part of the debt in satisfaction. Herman v. Schlesinger, 114 Wis. 382.

¹¹ Williams v. Blumenthal, 27 Wash. 24.

¹² Nassoioy v. Tomlinson, 148 N. Y. 326; Ennis v. Pullman Palace Car Co., 165 Ill. 161.

¹³ Scheffenacker v. Hoopes, 113 Md. 111. See also Jackson v. Volkening, 81 N. Y. App. Div. 36; Fuller v. Kemp, 138 N. Y. 231; 20 L. R. A. 785.

the creditor causes the check to be certified by the bank on which it is drawn, that is such a use of the check as amounts to an acceptance of the debtor's offer, although the creditor had not obtained the money on it up to the time of the trial of his action to recover the full amount of his claim.¹⁴

A release under seal of a debt paid only in part discharges it so effectually that even a subsequent promise to pay the residue is unenforceable.¹⁵

A creditor may forgive his debtor all or a part of the debt, provided the intention to give and other requisites of a valid gift are proved.¹⁶

In the case of an executory contract; *i. e.*, where something remains to be done by both parties, an agreement to waive the mutual rights under it is sufficient, or there may be such a change in the terms or parties as would amount to a novation.¹⁷ But when the contract has been executed on one side the above rules are applicable to an agreement to discharge or change the liability of the other. There must in such case be some collateral consideration sufficient in law to support a contract, which, when executed, constitutes an accord and satisfaction.¹⁸

Unliquidated damages. The rule in question in regard to the payment of a smaller sum in satisfaction is only applicable to a case where the sum due is definite. If the claim against the debtor is for uncertain, unliquidated damages, then the payment by him of a certain sum is a good discharge if accepted in satisfaction.¹⁹

¹⁴ Scheffenacker *v.* Hoopes, 113 Md. 111.

¹⁵ Ingersoll *v.* Martin, 58 Md. 67; Hale *v.* Rice, 124 Mass. 292; Co. Litt. 212, b.

¹⁶ Linthicum *v.* Linthicum, 2 Md. Ch. 21; Hayden *v.* Hayden, 142 Mass. 448; Gray *v.* Barton, 55 N. Y. 68.

¹⁷ See *post*, Part vi, ch. 1.

¹⁸ See *ante*, § 35, notes 2, 3.

¹⁹ Baird *v.* U. S., 96 U. S. 430; Brooke *v.* Waring, 7 Gill, 5; Kemp *v.* Raymond, 175 N. Y. 102. Cases relating to effect of acceptance of remittance of part of unliquidated or disputed claim accompanied by statement that it is in full are collected in notes to Harman *v.* Bank of Delight, 27 L. R. A. (N. S.) 439, and Canadian Fish Co. *v.* McShane, 14 L. R. A. (N. S.) 443.

§ 39. **Composition with Creditors.** A composition with creditors, whereby they agree to release their debtor upon payment of part of their claims, is apparently an exception to this rule; but the consideration for such release is the agreement of each creditor with the others as well as the part payment.¹ If a creditor orally agrees to unite with other creditors in accepting a certain composition which the debtor carries out with them and offers to carry out with him, he cannot, by refusing to unite in the composition deed, recover on his original claim, but is entitled only to the rate fixed by the agreement.² In such composition it is a fraud on the other creditors for one of them to make a private agreement with the debtor for a greater benefit to himself than the others receive.³ But when such secret arrangement has been made, the composition itself is not void, although the additional security must be surrendered.⁴ And the creditor who has stipulated for the secret preference does not forfeit his right to receive his proportion under the deed.⁵ The terms of the composition must be fulfilled in order to be a bar to a subsequent action against the debtor.⁶

§ 40. **Performance of Existing Contract as Consideration for a New Promise.** The question whether the promise of additional compensation to a party in exchange merely for his promise to carry out a contract he has already made with the promisor, or its performance, is based on a legal consideration or not has been differently decided. Most cases hold that when a man refuses to perform his contract unless some additional sum be paid him, a promise to pay it is without consideration, since it is based merely on the promisee's

¹ *Cheveront v. Textor*, 53 Md. 307.

² *Mellen v. Goldsmith*, 47 Wis. 573; *Chemical Bank v. Kohner*, 85 N. Y. 189. *Cf.* *Gardner v. Lewis*, 7 Gill, 378.

³ *Textor v. Hutchings*, 62 Md. 153.

⁴ *Cheveront v. Textor*, 53 Md. 305. See also *Hanover Nat. Bank v. Blake*, 142 N. Y. 404; 27 L. R. A. 33, *note*.

⁵ *White v. Kountz*, 107 N. Y. 518. *Contra*: 92 Cal. 403.

⁶ *Flack v. Garland*, 8 Md. 188. *Contra*: *Bartlett v. Woodworth Co.*, 69 N. H. 316.

doing or promising to do what he was already legally bound to do.¹

Other cases regard such a promise of additional compensation as valid, sometimes on the ground that while a contract is executory, the parties have a right to modify it at pleasure; sometimes on the theory that the promisee had the right to choose between breaking his contract and paying the damages and going on with it; sometimes on the theory that the promisor was benefited by having the contract performed.²

The true solution of this question would seem to depend upon the circumstances under which the promise of extra remuneration was made. When a man has contracted to do certain work for you, or to deliver certain goods, for a fixed price, and afterwards discovers that that work is of prime importance to you, or that there has been an advance in the market price of the goods, or that you cannot procure them except from him, and, for the purpose of extorting a larger sum by taking advantage of your necessities, declares that he will abandon the contract unless you pay him more than was

¹ *Erb v. Brown*, 69 Pa. 211; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Robinson v. Jewett*, 116 N. Y. 40; *Havana, etc., Co. v. Ashhurst*, 148 Ill. 115; *Strange v. Carrington*, 116 Ill. App. 410; *Widiman v. Brown*, 83 Mich. 241; *Lingenfelder v. Wainwright*, 103 Mo. 578; *Ayres v. Chicago, etc., R. Co.*, 52 Iowa, 478; *Blythe v. Robinson*, 100 Cal. 239; *Jones v. Risley*, 91 Tex. 1; *Shriver v. Craft*, 166 Ala. 146; 28 L. R. A. (N. S.) 450; *Conner v. Stilwell*, 34 N. J. L. 54 (*cf.* N. J. Trust Co. v. Nat. Gas Co., 71 N. J. L. 29, as to promise of extra pay after dispute as to meaning of contract); *Mallalieu v. Hodgson*, 16 Q. B. 689.

² *Munroe v. Perkins*, 9 Pick. 298; *Rollins v. Marsh*, 128 Mass. 116; *Agel v. Patch Mfg. Co.*, 77 Vt. 13; *Courtenay v. Fuller*, 65 Me. 156; *Connelly v. Devoe*, 37 Conn. 570; *Lattimore v. Harsen*, 14 Johns. 330; *Stewart v. Keteltas*, 36 N. Y. 388; *Cooke v. Murphy*, 70 Ill. 96; *Evans v. Oregon, etc., R. Co.*, 58 Wash. 429; 28 L. R. A. (N. S.) 456.

In *Parrot v. Mexican Central Ry.*, 207 Mass. 194, it is said that the limitation in that State to the general rule making invalid a promise to pay a man for doing that which he is already legally bound to do, is, "Where a plaintiff, having entered into a contract with the defendant to do certain work, refuses to proceed with it, and the defendant, in order to secure to himself the actual performance of the work in place of a right to collect damages from the plaintiff, promises to pay him an additional sum. This limitation rests upon the doctrine that under the circumstances there is a new consideration." See also, *Hanson v. Wittenberg*, 205 Mass. 324.

agreed upon, and you do promise, in all such cases of oppression and unfairness, your promise should be held invalid for lack of consideration. Indeed, in some instances, a promise so obtained would be deemed voidable also for undue influence.

But, on the other hand, when the person who has contracted to do work or deliver goods to you finds subsequently that unforeseen difficulties or expenses are involved in the performance of the contract, that the cost of materials or labor has been unexpectedly enhanced, or that he made a mistake in the calculations upon which the price named in the contract was based, and he demands additional pay for performing his contract, which you agree to give him, in such cases your promise is binding upon you when he does perform the contract.³ It is given indeed in exchange for the actual doing, or the promise to do, what the promisee was already bound to do. But under these circumstances, he has a moral as well as a legal right to choose between the prospect of loss if he carries out the original contract and the liability to pay damages for his failure to perform. You have the right indeed to recover those damages, for by the contract the risks arising from unexpected difficulties or unforeseen expenses are thrown upon him, but you may find it to your advantage not to enforce that right. In *Linz v Schuck*,⁴ Boyd, C. J., said: "When two parties make a contract based on supposed facts which they afterwards ascertain to be incorrect and which would not have been entered into by the one party if he had known the actual conditions which the contract required him to meet, not only courts of justice but all right-thinking people must believe that the fair course for the other party to the contract to pursue, is either to relieve the contractor from going on with his contract or to pay him additional compensation * * * It would be an extremely harsh rule of law to hold that there was no legal way of binding the owner of property to fulfill a promise

³ *King v. Duluth, etc. R. Co.*, 61 Minn. 487; *John King Co. v. L. & N. R. Co.*, 131 Ky. 46; *Osborn v. Reilly*, 42 N. J. Eq. 467.

⁴ 106 Md. 220.

made by him to pay the contractor such additional sum as such unforeseen difficulties cost him."

It may be that the strict logical application of the rule, that the doing what one is already bound to do is not a consideration for a promise, leads to a different conclusion. But it frequently happens that the march of a legal principle to its logical end is met and repulsed by a counterstroke of another legal principle which also finds a proper field for its activity in the particular case. Here the doctrine of estoppel, the requirements of fair dealing and the duty to abide by a promise upon which another has relied to his hurt, all demand that the agreement as to the extra compensation should be upheld.

The contractor for making a cellar encountered unexpectedly soft mud under a crust of earth which greatly increased the cost of the work. He refused to go on with it unless the other party would pay the extra cost. The promise to do so was made and held to be enforceable. It was also held that in such case, it is not necessary that the original contract should be expressly rescinded, but the effect of a promise of extra pay and its acceptance is to substitute a new and modified contract for the original agreement.⁵

In another case,⁶ certain brewers in November, 1879, contracted with an ice company for a supply of ice during the season of 1880, at \$1.75 per ton or \$2.00 per ton if the crop should prove to be short. The crop failed, and in the following May the ice company notified the brewers that they could not carry out the contract. Then the latter, having a large quantity of beer on hand, made a new arrangement with the company, agreeing to pay \$3.50 per ton. Some ice was paid for at this rate, and a note was given for the balance. In an action on the note, where the defense was want of consideration and duress, Cooley, J., said that, the defendants instead of refusing the demand of the plaintiffs and suing for damages, "chose, for reasons which they must have deemed sufficient at the time, to submit to the company's

⁵ *Linz v. Schuck*, 106 Md. 220; 28 L. R. A. (N. S.) 789.

⁶ *Goebel v. Linn*, 47 Mich. 489.

demand and pay the increased price rather than rely upon their strict rights and the existing contract. * * * Unexpected and extraordinary circumstances had rendered the contract worthless, and they must either make a new arrangement or in insisting upon holding the ice company to the existing contract, they would ruin the ice company and thereby at the same time ruin themselves. It would be very strange if, under such a condition of things, the existing contract, which unexpected events had rendered of no value, could stand in the way of a new arrangement and constitute a bar to any new contract which should provide for a price that would enable both parties to save their interests."

Where there was an agreement to reduce the rent of certain premises, it was held that a change in the business position of the promisee was a sufficient consideration.⁷

§ 41. **Promise to Perform Existing Contract With Third Person.** Whether a promise by A. to perform a contract he has already made with B., or its actual performance, is a consideration for a new promise by C. is also the subject of conflicting decisions. Some of these hold that such performance is not a consideration, since the promisee merely does what he was already bound to do by contract with the third person.¹

But it would seem that the better doctrine is that of other adjudications which hold such promises to be valid.² These rulings may be supported not only on the consideration of

⁷ *Hastings v. Lovejoy*, 140 Mass. 261. A promise of the lessor to reduce the rent was held to be valid in *Ten Eyck v. Sleeper*, 65 Minn. 413. As to an agreement to give additional pay to an employee, see *Blodgett v. Foster*, 120 Mich. 392; *Price v. Press Pub. Co.*, 117 N. Y. App. Div. 854; *Davis & Co. v. Morgan*, 117 Ga. 148; 61 L. R. A. 148.

¹ *Wimer v. Overseers*, 104 Pa. 317; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Gordon v. Gordon*, 56 N. H. 58; *Havana, etc., Co. v. Ashurst* 158 Ill. 115; *Davenport v. Cong. Society*, 33 Wis. 387; *Sherman v. Brigham*, 39 Ohio, 137. Other cases are also cited in Williston's edition of *Wald's Pollock on Contracts*, p. 210.

² *Scotson v. Pegg*, 6 H. & N. 295; *Abbott v. Doane*, 163 Mass. 433; *Donnelly v. Newbold*, 94 Md. 220; *Day v. Gardner*, 42 N. J. Eq. 199; *Merrick v. Giddings*, 1 Mackey (D. C.), 394; *Green v. Kelley*, 64 Vt. 319; *Humes v. Decatur Co.*, 98 Ala. 461.

benefit to the promisor, and upon the grounds of estoppel and good faith mentioned in the preceding section, but also for the reason suggested by Sir W. Anson, that the promisee abandons his right to rescind by agreement his contract with the third person.³

An uncle promised his nephew in writing that if the latter would marry a certain lady to whom he was then engaged he would pay him £150 a year during his (the uncle's) lifetime. After the nephew's marriage, it was held that he was entitled to recover the arrears of the annuity from his uncle's executors.⁴

When A. has contracted with B. to do a certain thing, "if after A. has refused to go on with his undertaking, or while he is hesitating whether to perform it or submit to such damages as B. may be entitled to recover, other persons interested in having the contract performed intervene and enter into a new agreement with A. by which A. agrees to do that which he was already bound by his contract with B. to do, and they agree jointly or severally to pay him a certain sum of money and give their notes therefor, and A. accordingly does what he had before agreed to do but what perhaps he might not otherwise have done, no good reason is perceived why they should not be held to fulfil their promise. They have got what they bargained for."⁵

When defendant writes to the plaintiff, who had already contracted to supply bricks to a builder, saying that if the builder does not pay for them, he will, the guarantee is supported by a consideration, since the defendant was interested in the land which was to be improved by the use of the bricks.⁶

³ Anson says (Contracts, p. 106, note 2, 10th ed.): "The question after all narrows itself down to this—is it or is it not for our practical convenience that we should carry the doctrine of consideration to its logical results?" In *Williams v. O'Keefe*, [1910], App. Cas. 191, the Lord Chancellor says: "If any party makes a contract for a good consideration to do something he was already bound to do, although no one was at the time sure that the duty already existed, the other party can sue upon the contract."

⁴ *Shadwell v. Shadwell*, 9 C. B. N. S. 159.

⁵ *Abbott v. Doane*, 163 Mass. 433; 34 L. R. A. 33.

⁶ *Donnelly v. Newbold*, 94 Md. 220.

§ 42. **Past Consideration.** An executed consideration is an act or forbearance given in exchange for a promise. An executory consideration is said to be a promise given in exchange for an act or a counter promise. This also is in reality an executed consideration, as was previously explained. A past consideration is where some act of one party conferred a benefit upon another without creating any liability and afterwards the latter makes a promise on account of that benefit. Since this promise is not given contemporaneously with the act of the other party, it is obvious that it is purely voluntary. The promisor gains nothing by making the promise so that there is no benefit to him, and the promisee neither does nor forbears anything in consequence of the promise, so that there is no detriment to him. Hence a past consideration is no consideration at all.¹

Where defendant's son of full age, fell ill among strangers, and being poor was relieved by the plaintiff, and defendant afterwards promised to pay plaintiff the expenses incurred, it was held that such promise was without consideration.² If services are gratuitously rendered by one person for another, a promise to pay for them is likewise without consideration.³ So a promise to pay a man for having, without being requested, obtained a tenant for the promisor's house, is unenforceable.⁴ After a horse has been sold, a warranty of its soundness by the seller, merely on account of the previous sale, is invalid for lack of consideration.⁵

¹ *Lloyd v. Fulton*, 91 U. S. 479, and cases *ante*, § 33.

² *Mills v. Wyman*, 3 Pick. 207, approved in *Ellicott v. Peterson*, 4 Md. 470. So a promise to pay for a surgical operation performed on defendant's son but not at his request is unenforceable. *Conant v. Evans*, 202 Mass. 34.

³ *Gardner v. Schooley*, 25 N. J. Eq. 150; *Allen v. Bryson*, 67 Iowa, 591; *ante*, § 10, note 19. As to when an agreement will be implied to pay for services rendered by a relative, see note to *Hodge v. Hodge*, 11 L. R. A. (N. S.) 873.

⁴ *Sharp v. Hoopes*, 74 N. J. L. 191.

⁵ *Aultman v. Kennedy*, 33 Minn. 339; *Roscorla v. Thomas*, 3 Q. B. 234. A few cases lay down a different rule when the services were not rendered with the intention of bestowing a favor on the other party, but were rendered under such circumstances as imposed no legal liability upon the latter, and hold that then his subsequent

§ 43. **Consideration Executed Upon Request.** An exception to the rule declaring invalid a past consideration is sometimes said to exist when the act or forbearance was given at the request of one who afterwards promised to pay for it, and it is said that in such case the past consideration supports the promise.¹ This must be intended to apply to a case where the request to do the act and the doing it did not, in the first instance, impose any liability upon the promisor. The chief authority for this alleged exceptions is *Lampleigh v. Braithwait*,² where defendant, having killed a man, asked the plaintiff to obtain a pardon from the king. The plaintiff alleged that he journeyed and labored at his own charges to obtain said pardon, which was granted, and afterwards defendant promised to pay him £ 100. There was nothing in the declaration showing that the parties did not intend the services to be gratuitous but that was a judgment for the plaintiff. It is said in *Moore v. Elmer*,³ that "the modern authorities which speak of services rendered upon request as

promise to pay for them is enforceable. Thus a promise to pay for keeping defendant's bull, which had escaped and been cared for by the plaintiff without defendant's knowledge, was enforced. *Booth v. Fitzpatrick*, 36 Vt. 681. *Contra*: *Bartholomew v. Jackson*, 20 John. 28.

¹ *Pool v. Horner*, 64 Md. 131; *Landis v. Royer*, 59 Pa. 95; *Silverthorn v. Wylie*, 96 Wis. 69; *Daily v. Minnick*, 117 Iowa, 563; 60 L. R. A. 840.

² *Hobart*, 105; 1 *Smith's L. C.* 136 (1612).

³ 180 Mass. 17, per *Holmes, C. J.* Most of the recent writers on the law of contract unite in pronouncing this alleged exception to be repugnant to principle. There are, however, few decisions directly in point which deny it. In *Potts' Summary of Contracts*, p. 294, it is said: "Supposing that A. does something at B.'s request, without any intention of creating a legal liability, and afterwards B. promises to pay him £ 5, the modern opinion would make it impossible to give any effect at all to B.'s promise. While having to admit the request, the benefit conferred, and his freely expressed intention to pay for it, A. could defeat B.'s claim by the plea of past consideration. But the old opinion would enable the Court to give full legal effect to A.'s expressed intention by simply treating the subsequent promise as part of the original request—the subsequent promise is in fact treated as *proof* of the prior intention. For this reason alone there seems little doubt that the Courts will uphold the old opinion when the actual point arises for decision."

supporting a promise must be confined to cases where the request implies a contract to pay and do not mean that what was done as a mere favor can be turned into a consideration at a later time by the fact that it was asked for."

§ 44. **Doing What the Promisor was Legally Bound to do.**

In a few early English cases, arising under special circumstances, it was ruled that if one man voluntarily does that which another was legally compellable to do, and the latter afterwards promises to reimburse him, the promise is enforceable.¹ Anson says that "the promise, in the cases cited to support this supposed rule, was either based upon a moral obligation which, since the decision in *Eastwood v. Kenyon*² would be insufficient to support it, or was an acknowledgement of an existing liability arising from a contract which might be implied by the acts of the parties."³

In this country, it has been held that if one voluntarily pays a debt due by another, a subsequent promise by the latter to reimburse him is enforceable.⁴ But if no such promise be made, the voluntary payment by one person of a debt due by another imposes no liability upon the latter.⁵

§ 45. **Benefit Conferred Under Void Contract.** A few cases hold that a promise to pay for services rendered under a void contract is supported by the moral obligation.¹ The promise may also be regarded as the ratification of a void act.

¹ *Wing v. Mill*, 1 B. & Ald. 105; *Paynter v. Williams*, 1 C. & M. 810.

² 11 A. & E. 438.

³ *Contracts*, 119.

⁴ *Wright v. Farmers Bank*, 31 Tex. Cir. Ap. 406; *Doty v. Wilson*, 14 Johns. 378; *Gleason v. Dyke*, 22 Pick. 390. *Contra*: *Mass. Ins. Co. v. Green*, 185 Mass. 306, where the person making the payment supposed erroneously that he was paying his own debt.

⁵ *Dougherty Co. v. Gring*, 89 Md. 535; *Hearn v. Cullin*, 54 Md. 542; *Mayor, etc., v. Hughes*, 1 G. & J. 480. The reasons for this rule are well stated in *Turner v. Egerton*, 1 G. & J. 433.

¹ *Muir v. Kane*, 55 Wash. 131; *Edson v. Poppe*, S. D. (124 N. W. 441); 26 L. R. A. (N. S.) 534; *Bailey v. Philadelphia*, 167 Pa. 569; *Trimble v. Rudy*, 53 L. R. A. 353, 373, and note. *Contra*: *Stout v. Humphrey*, 69 N. J. L. 436; *Hobbs v. Greifenhagen*, 91 Ill. App. 400. See cases cited in note to *Muir v. Kane*, 26 L. R. A. (N. S.) 520.

It has been said that the principle is "that when the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law made for his advantage, he may renounce the benefit of such law and if he promises to pay the debt which is only what an honest man ought to do, he will then be bound by law to perform it * * * * Here the defendant says, 'I could not then make the promise, I can now, and I am willing to do so.'"²

Upon this principle may be supported the promise of a woman who has become discover to pay a debt incurred while married, when the contract was void.³ But as previously stated, the decisions on this point are contradictory.⁴

Upon some questions in the law relating to consideration there is a tendency to a divorce between what is called in the civil law the doctrine, that is the opinions of jurists and theoretical writers, and the jurisprudence, that is, the decisions of the Courts. The principal modern writers condemn, as being repugnant to the true theory of consideration, the decisions referred to in sections 41, 43, 44 and 45, which enforce the promises there mentioned.

§ 46. **Exceptions to the Rules of Consideration.** There are very few exceptions to the rule that no simple promise will be enforced unless it was made for a consideration contemporaneously given. The chief exception is in the case of negotiable instruments which may be enforced by the holder in due course against a voluntary promisor. This liability was finally established as a general principle of the law merchant, under the decisions of Lord Mansfield in the 18th Century, and not as an exception to the then undeveloped theory of consideration. It is now confirmed by statute in the negotiable instrument law as well as by adjudication.

² Pollock, C. B., in *Flight v. Reed*, 1 H. & C. 703, citing *Earle v. Oliver*, 2 Exch. 90, and *Lee v. Muggeridge*, 5 Taunton, 36. See *Sheldon v. Haxton* 91 N. Y. 124.

³ *Goulding v. Davidson*, 26 N. Y. 604.

⁴ See *ante*, sec. 33, note 5.

In a few other cases, a promise not supported by a consideration is enforced upon grounds of estoppel. The promises in such cases of estoppel generally relate to the extinguishment of a contract rather than to its formation.¹

Acknowledgment of barred debts. Real exceptions to the rule as to the insufficiency of a past consideration or of a moral obligation occur when the promise amounts to a renunciation of a defense afforded by statute to what was at one time an enforceable liability.

A promise to pay a debt barred by the statute of limitations revives the remedy.² Not only does an express promise to pay such a debt remove the bar of the statute, but an acknowledgment of it as a subsisting debt, is also sufficient for that purpose, because then a promise to pay will be implied.³ A part payment of principal or interest is such an acknowledgment.⁴

A promise by a bankrupt or insolvent to pay a debt from which he has been discharged by law is a waiver of the discharge.⁵

A promise by a person after coming of age to pay a debt contracted during infancy removes the defense of infancy.⁶

¹ See *post*, part vi, ch. 1.

² *Oliver v. Gray*, 1 H. & G. 204, note; *Elliott v. Nichols*, 7 Gill, 86, note.

³ *Shipley v. Shipley*, 66 Md. 558; *Wilmer v. Gaither*, 68 Md. 342; *Hall v. Bryan*, 50 Md. 194; *Boone v. Colehour*, 165 Ill. 305; *Campbell v. Holt*, 115 U. S. 625. As to what constitutes such an acknowledgment of a debt as amounts to a promise to pay it, see *Beeler v. Clarke*, 90 Md. 221; *Gill v. Donovan*, 96 Md. 518; *Gill v. Staylor*, 97 Md. 665. As to acknowledgment by testimony in another case, see *Babylon v. Duttera*, 89 Md. 444. As to the effect of an acknowledgment by an executor, see *Houck v. Houck*, 112 Md. 122.

⁴ *Burgoon v. Bixler*, 55 Md. 384. The payment must be expressly made as a partial discharge of a larger sum then admitted to be due. *Ryan v. Canton Bank*, 103 Md. 428.

⁵ *Yates v. Hollingsworth*, 5 H. & J. 216; *Wolffe v. Eberlein*, 74 Ala. 99; *Shaw v. Burney*, 86 N. C. 334; *Katz v. Moessinger*, 110 Ill. 372; *Dusenbury v. Hoyt*, 53 N. Y. 521; *Allen v. Ferguson*, 18 Wall. 1.

⁶ *Tibbitts v. Gerrish*, 25 N. H. 41; *Barlow v. Robinson*, 174 Ill. 317.

A promise by an endorser of a negotiable instrument to pay it is enforceable although he was discharged from liability on account of the failure to give him notice of dishonor.⁷

But a promise to pay a debt which has been voluntarily released under seal by a creditor is not binding because the release is regarded as having extinguished the debt.⁸

⁷ *Yeager v. Farwell*, 13 Wallace, 6; *Ross v. Hurd*, 71 N. Y. 14; *Turnbull v. Maddux*, 68 Md. 579.

⁸ *Ingersoll v. Martin*, 58 Md. 67.

CHAPTER III

FORMAL CONTRACTS

§ 47. **Classification.** All contracts are divided, according to most English writers, into three classes of: 1. Contracts of Record. 2. Contracts under seal. 3. Simple contracts, and this third class is subdivided into (*a*) contracts required to be in writing, and (*b*) contracts which may be orally made.¹

In some cases the law allows the parties complete liberty in forming contracts, so that words, actions, signs, or even silence may produce that effect, provided the consent of the parties and a consideration are established. This is the case with all simple or parol contract not required to be in writing. In other cases, the law restricts the choice of means and provides that the effect aimed at can only be achieved by the use of a certain form of expression, the neglect to use which may cause the attempted act to be either void or unenforceable. The most solemn forms may indeed be used when not legally necessary, but that does not make the contract a formal one. It is the legal necessity for the use of the form that determines this question.² Whenever a form is required for a contract it is a formal one, whether a consideration is also requisite or not.

§ 48. **Formalism.** The infancy of all systems of law is characterized by an excessive devotion to words and forms.

¹ Addison on Contracts, 2; Leake, Contr. 1; Smith, Contr. 3; Parsons, Contr. 7. "The law makes no distinction in contracts except between contracts which are and contracts which are not under seal." Lord Abinger in *Beckham v. Drake*, 9 M. & W. 92. "All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing." *Rann v. Hughes*, 7 Term. Rep. 350, 351.

² Von Jhering, *Geist des römischen Rechts*, § 50. What is said in this and the following section concerning formalism is chiefly derived from §§ 49 and 50 of that work (French translation, vol. 3, pp. 134-187).

Blackstone says¹: "Anciently, among all the northern nations, shaking of hands was held necessary to bind the bargain, a custom which we still retain in many verbal contracts."

At the head of the history of law one might write, says Von Jhering,² this epigraph, *In principio erat verbum*. The word is a power, it binds and looses. If it cannot remove mountains, it can at least change the ownership of fields. While most of this legal logomachy has been abandoned, there are still many cases in which, for historical reasons, particular words or forms have an effect given to them quite independent of any consideration of the intention of the parties. For instance, a devise to A. for life, with remainder to the heirs of his body has a very different meaning in law from a devise to A. for life with remainder to his children. An indictment for a misdemeanor charging the offence to have been *feloniously* committed was fatally bad. The important role played by forms in early English law,—such as the delivery of a clod of earth or a twig to the grantee of land in livery of seisin,—is like hieroglyphic writing which is used because intelligence has not been sufficiently developed to rise to the alphabet writing of abstract ideas. But, although introduced for this reason, forms are often retained for other reasons, and serve useful purposes, one of which is to keep alive a sense of the historical continuity of law.

There are advantages as well as disadvantages in formalism. The disadvantages are obvious. Ignorance or misuse of a form is punished without regard to the real merit of the case. The most solemn testament of a man is treated as waste paper if not executed in the mode prescribed by statute.³ Many other examples may be found in criminal law and in the law of procedure. The more complicated and

¹ 2 Comm. 448. It is said that among the Germanic people in the Middle Ages the system of symbolical forms extended to nearly all juridical manifestations of consent. To convince a man that a bargain had been made it was necessary to shake hands, or deliver the branch of a tree, etc. Giving an arrow to a slave was a symbol of his emancipation.

² *Op. cit.* § 49. See *ante*, § 47, note 2.

³ *Brengle v. Tucker*, 114 Md. 597.

technical a form is, the less danger is there in using it. Fewer mistakes are made in deeds, etc., concerning attestation, sealing, acknowledgment, than in contracts under the Statute of Frauds where no exact form is prescribed. The artificial construction placed upon that statute shows the effort of the Courts to relieve from the consequences of a failure to observe the form required. The tendency of commerce is to emancipate itself from the fetters of form, and it is likely enough that not one-half of the contracts actually made which are within the 4th and 17th sections of the Statute of Frauds follow the prescribed form.⁴

The advantage of formalism is that the form is for a legal act what the stamp is for coin. It fixes its value and effect in an authoritative and easily recognizable manner. It is often difficult to determine whether what is said amounts only to a willingness to treat about a matter or is an absolute contract, and the adoption of a form removes this difficulty. There is a distinct advantage in the possession of such an implement as the contract under seal, which relieves one from the necessity of proving a consideration. The importance attached to words contributes also to the formation of a fixed, scientific language. When these technical terms are used, the interpretation can be clearly foreseen. They are therefore useful when employed by the skilful although dangerous in the hands of the ignorant. When loose and popular terms are used, it is difficult to foresee what construction the Courts will place upon them, for that depends upon what the Court in the particular case may think the meaning of the parties to have been.

§ 49. **Contracts of Record.** These are so styled because when made they are matters of record in Courts. A judgment, a recognizance, a security for costs or a supersedeas is a contract of record. A judgment although it may be entered by confession in pursuance of a contract is not itself strictly speaking a contract. It is an obligation, but since

⁴ There are certain ethical objections to such a statute which are set forth by Von Jhering in the work cited.

the obligation is created not by the common consent of the parties but by judicial act, it cannot be aptly styled a contract.

A recognizance is an obligation of record and when forfeiture is declared and entered by the Court, it becomes a judgment. A recognizance is the ordinary method of taking bail for the appearance of an accused person before a Court. It is in effect a contract between the State and the party entering into it. A supersedeas is an agreement of record by two sureties to pay a judgment recovered against a party after the expiration of the stay of execution which is secured by the making of the supersedeas.

§ 50. **Contracts Under Seal.** A contract under seal is also called a *specialty*, because a special contract as opposed to a simple contract, which is one not under seal, whether in writing or not.¹ An instrument under seal providing for the payment of money is called a single bill, or a bond; the later term being often used to designate a conditional undertaking, while the former indicates an absolute promise to pay and one therefore single—*simplex obligatio*.²

How made. A contract under seal, must be written or printed and signed, sealed and delivered.³ At common law an impression on wax or paper was necessary to constitute a seal, but in most of the States, either under statutes or by local usage, a seal may be a scrawl or scroll, or printed representation.⁴ It is not necessary that it should be adopted by the obligor by a declaration in the body of the specialty in order to make it his seal. Although it is not essential that every one signing a deed should have a separate seal, nor that there should be as many seals as signatures, yet if one

¹ 2 Blackstone, Com. 465; *Bank v. Donnelly*, 8 Pet. 361.

² 2 Blackstone, Com. 340; *Koshkoning v. Burton*, 104 U. S. 673.

³ Attestation is not essential unless expressly required in the particular case, but is customary. *Harben v. Phillips*, L. R. 23 Ch. D. 14.

⁴ See *Jacksonville Nav. Co. v. Hooper*, 160 U. S. 514. In *Trasher v. Everhart*, 3 G. & J. 234, the Court said that from the earliest period of the judicial history of Maryland a scrawl had been considered to be a seal.

omits by mistake to affix a seal, the instrument cannot be considered as his deed.⁵

An official seal, such as that of a Vice-Consul, impressed upon a promissory note, does not make it a sealed instrument.⁶ Nor does the printed representation of a seal on the note of a corporation restrain its negotiability, or make it a single bill only assignable as such. The object of the seal is rather to attest the genuineness of the note.⁷

When a contract made by a corporation, and signed by its officers, has the corporate seal affixed, but there is no reference to the seal in the body of the contract, and it does not purport to be a specialty, the instrument is to be regarded as a simple contract.⁸

Delivery is essential.⁹ To constitute delivery the obligor must do some act putting it out of his power to revoke. Delivery may be to the grantee, or to a third party or stranger for the grantee. It may be inferred from the circumstances of the case, and is *prima facie* presumed to have taken place

⁵ *State v. Humbird*, 54 Md. 327; *Stabler v. Cowman*, 7 G. & J. 284. When a written contract concludes with the words, "witness our hands and seals," but is signed and not sealed, it is valid as a simple contract. *Noel v. Atlas Cement Co.*, 103 Md. 209.

⁶ *De Bebian v. Gola*, 64 Md. 262.

⁷ *Jackson v. Myers*, 43 Md. 452.

⁸ *Smith v. Woman's Medical College*, 110 Md. 411. So the printed representation of a seal on a policy of insurance, when there is no statement in the body referring to it, does not make the policy an instrument under seal. *Met. Ins. Co. v. Anderson*, 79 Md. 375.

⁹ *Howard v. Carpenter*, 11 Md. 259; *Carey v. Dennis*, 13 Md. 1; *Owens v. Miller*, 29 Md. 144; *Harris v. Register*, 70 Md. 109. Evidence is admissible to show that although a contract was signed and sealed by both parties, there was a contemporaneous parol agreement that it was not to go into effect except at the option of one of them, and that it had never been delivered. *Harrison v. Morton*, 83 Md. 456, affirmed on this point in 171 U. S. 38. As to offer under seal, see *ante*, p. 12.

on the day of the date.¹⁰ Delivery may be made dependent upon the performance of a condition resting in parol.¹¹

Proof of execution and possession is *prima facie* evidence of delivery and acceptance.¹² But this presumption may be rebutted.¹³

When an agent authorized to make a simple contract only does affix a seal to a contract made for his principal, the seal may be rejected as surplusage and an action of assumpsit brought on the contract as one made by parol.¹⁴

If parties stipulate that their agreement shall be put into the shape of a written contract, one of them is not entitled to require that the writing shall be executed under seal.¹⁵

§ 51. **Characteristics of the Contract Under Seal—Consideration.** The common law has never required a consideration in contracts under seal, but has enforced them because they were held to be the deliberate engagements of the parties making them.¹ Hence a gratuitous promise under seal is enforceable at law as any other kind of promise, or, to speak more accurately, the question of consideration is not raised in an action on a sealed instrument.² This principle is some-

¹⁰ *Duer v. James*, 42 Md. 402; *Brown v. Murdoch*, 16 Md. 522; *Barry v. Hoffman*, 6 Md. 78. Evidence is admissible to show that the specialty was delivered after its date, and it takes effect from delivery. *District of Col. v. Camden Iron Works*, 181 U. S. 461. As to filling in blanks after delivery, see *Carr v. McColgan*, 100 Md. 462; *Edelin v. Sanders*, 8 Md. 118.

¹¹ See *post*, Part v, ch. 1.

¹² *Edelin v. Sanders*, 8 Md. 118; *Wilson v. Ireland*, 4 Md. 144; *Glenn v. Grover*, 3 Md. 213; *Milburn v. State*, 1 Md. 1; *Keedy v. Moats*, 72 Md. 325.

¹³ *Leppoc v. Bank*, 32 Md. 137.

¹⁴ *Horner v. Beasley*, 105 Md. 193. So when a receiver, without authority of the Court, executes a release under seal upon the payment to him of money he was directed to collect, the seal must be treated as of no effect. *Murphy v. Penniman*, 105 Md. 452.

¹⁵ *Noel Co. v. Atlas Cement Co.*, 103 Md. 209.

¹ *Holmes*, *The Common Law*, 254, 273.

² *Edelin v. Gough*, 5 Gill, 104; *Stewart v. Redditt*, 3 Md. 68; *Mitchell v. Williamson*, 6 Md. 210; *Edelin v. Sanders*, 8 Md. 118; *Bond v. Conway*, 11 Md. 512; *Bouldin v. Reynolds*, 58 Md. 491; *Spitze v. B. & O. R. Co.*, 75 Md. 162; *Storm v. U. S.*, 94 U. S. 84.

times expressed by the formula that "a seal imports a consideration." But this statement is not historically correct, for contracts under seal were recognized and enforced by the Courts long before the doctrine of consideration first made its appearance in English law.³

The maker of a bond may show that it was originally void, as by reason of lunacy, fraud, coverture, etc., or that it has become void subsequently as by erasure, or alteration. But generally the only reply that can be made to an action at law on a bond for the payment of a certain sum of money is *non est factum*, payment or release.⁴

Any writing under seal whereby a debt is acknowledged to exist creates an obligation enforceable by action when the time of payment arises.⁵ An instrument under seal by which the obligor declares that a certain sum is due to the obligee, but making the same payable after death by the obligor's executor, is valid and binding on the estate of the maker.⁶

Courts of Equity do not give such effect to a seal, but inquire into the real consideration, and refuse to enforce a voluntary promise although it is under seal.⁷ In special cases Equity has restrained actions at law on bonds, etc., because there were equitable reasons why the plaintiff should not be allowed to recover the stipulated sum which could not be availed of by the defendant in the legal action.⁸

³ See *ante*, § —.

⁴ *Edelin v. Sanders*, 8 Md. 118; *Mitchell v. Williamson*, 6 Md. 210; *Edelin v. Sanders*, 8 Md. 118; *Bond v. Conway*, 11 Md. 512; *Bouldin v. Reynolds*, 58 Md. 491; *Spitze v. B. & O. R. Co.*, 75 Md. 162; *Storm v. U. S.*, 94 U. S. 84.

⁵ See *ante*, § 25.

⁶ *Edelin v. Sanders*, 8 Md. 118; *Mitchell v. Williamson*, 6 Md. 210.

⁷ *Sharp v. Bates*, 102 Md. 347; *Cover v. Stem*, 67 Md. 451.

⁸ *Feeser v. Feeser*, 93 Md. 716.

⁷ *Duttera v. Babylon*, 83 Md. 536; *Selby v. Case*, 87 Md. 459; *Snyder v. Jones*, 38 Md. 542; *Black v. Cord*, 2 H. & G. 100; *In Re Lucas*, L. R. 45 Ch. D. 470.

⁸ *Key v. Knott*, 9 G. & J. 342; *Harwood v. Jones*, 10 G. & J. 404; *Dorsey v. Hobbs*, 10 Md. 412. Statutes now generally allow equitable defenses to be made at law.

2. A single bill, *i. e.*, an absolute promise under seal to pay a definite sum of money, is not a negotiable instrument in the same sense that ordinary promissory notes and bills of exchange are.⁹

3. Estoppel. Statements in a specialty are binding upon the parties and their privies in estate.¹⁰

4. Merger. There cannot be a contract under seal and a simple contract between the same parties and for the same purpose. There will be a merger of the simple contract into the one under seal, whether the parties wish it or not, for the two contracts are incompatible and the higher must prevail.¹¹ But if the agreement under seal is simply collateral to the other, or is accepted as additional security for a pre-existing debt, there is no merger.¹²

5. Limitations. A right of action arising out of a simple contract is barred if not exercised within the time fixed by statute after it accrued, which is generally much shorter than the time within which actions on contracts under seal may be brought.

In a few States, the distinction between simple contracts and contracts under seal has been abolished, by statute, and in some others it is provided that a seal shall be only *prima facie* evidence of consideration.

⁹ Talbot *v.* Suit, 68 Md. 443.

¹⁰ Alexander *v.* Walter, 8 Gill, 239, *note*.

¹¹ Leonard *v.* Hughlett, 41 Md. 380.

¹² Brengle *v.* Bushey, 40 Md. 147; Rees *v.* Logsdon, 68 Md. 588.

CHAPTER IV

CONTRACTS WITHIN THE STATUTE OF FRAUDS

The chief simple contracts for which a writing in addition to a consideration is requisite are promissory notes, bills of exchange, assignments of choses in action and contracts within the fourth and seventeenth sections of the Statute of Frauds.

§ 52. **The Fourth Section.** The Statute of Frauds—29 Car. II, ch. 3, sec. 4, provides:

No action shall be brought whereby to (1) charge any executor or administrator upon any special promise to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged or some other person thereunto by him lawfully authorized.

The fourth and seventeenth sections of this statute have been substantially re-enacted throughout the United States. In Maryland the original statute has been in force ever since Colonial days without any legislative re-enactment.

§ 53. **The Memorandum in General.** The following points are to be noted in regard to these contracts in general:

(a) The writing is chiefly required, not for the existence or validity of the contract, but for its evidence. And the form does not, as in a contract under seal, supply the place of a consideration. If there be no memorandum made as required, the contract is not void or unlawful but only unen-

forceable; and if benefits have been conferred in pursuance of it they must be paid for.¹

Under special circumstances equity will enforce a contract within the Statute although not in writing. Thus, where the terms are agreed upon, reduced to writing and partly executed, and one party fraudulently refuses to sign the agreement as he had promised to do or to carry it out, a Court of equity will compel him to produce and sign the original contract or a new one of similar import.²

(b) The memorandum must show who are the contracting parties. Not only who is the person to be charged, but also the person in whose favor he is charged.³ The person in whose favor the contract is made however, may be sufficiently described without being named.⁴

(c) The memorandum may consist of various papers, but must be connected, consistent and complete; and parol evidence is inadmissible to connect separate written papers.⁵

¹ *Baker v. Lauterbach*, 68 Md. 64; *Hamilton v. Thirston*, 93 Md. 213; *Sovereign v. Ortman*, 47 Mich. 181; *Pulbrook v. Lawes*, L. R. 1 Q. B. D. 284. "The ground of recovery in that case is that the defendant has got the plaintiff's property without having fully paid for it, or that the plaintiff has paid the defendant in advance without receiving a *quid pro quo*." *Kelley v. Thompson*, 181 Mass. 124. See also, *Peabody v. Fellows*, 177 Mass. 290, and 181 Mass. 26.

² *Eq. Gas Co. v. Balto. Coal Tar Co.*, 63 Md. 285. See also, *Phoenix Ins. Co. v. Ryland*, 69 Md. 437.

³ *McElroy v. Seery*, 61 Md. 397.

⁴ *Owings v. Baldwin*, 8 Gill, 337, note *c*. In *Carr v. Lynch* [1900], 1 Ch. 613, a landlord signed the following memorandum: "Dear Sir. In consideration of your having this day paid me 50l. I hereby agree to grant you a further lease of 24 years of the Warden Arms to run immediately after the expiration of the now existing lease." It was held that although the name of the lessee did not appear he was sufficiently described as the person who had paid the 50l. The memorandum should also distinguish between buyer and seller. *Salmon Falls Co. v. Goddard*, 14 Howard, 446.

⁵ *Moale v. Buchanan*, 11 G. & J. 314, and note; *Frank v. Miller*, 38 Md. 459; *Lazear v. Bank*, 52 Md. 78. But parol evidence is admissible to identify a paper referred to. *Oliver v. Hunting*, L. R. 44 Ch. D. 205. When a letter does not show the name of the person to whom it was written, evidence is admissible to show that it was contained in a certain addressed envelope. *Pearce v. Gardner* [1897], 1 Q. B. 688.

The complete contract may, however, be gathered from letters, writings and telegrams between the parties and so connected with each other that they may be fairly said to constitute one paper.⁶ When the agreement for the sale of goods was made upon the terms that the notes given therefor should be satisfactory to the seller, a memorandum which fails to mention this condition is insufficient.⁷ But it is not necessary to mention the time when the goods are to be delivered if no time was fixed in the parol contract.⁸

The terms of the written memorandum cannot be altered by a subsequent oral agreement.⁹

Evidence is admissible to show that a signed memorandum of sale does not contain all the terms verbally agreed upon by the parties, not for the purpose of contradicting it but to show that it does not comply with the statute.¹⁰

(*d*) The consideration must not only exist but it must appear, expressly or by implication, upon the face of the writing itself, and cannot be supplied by parol evidence. This rule was made because the word agreement is used in the statute, and that word "is not satisfied unless there be a consideration, which consideration, forming part of the agreement, ought therefore to have been shown, and the promise is not binding by the statute unless the consideration which forms part of the agreement be also stated in writing."¹¹ This rule has been changed in some States and as to guarantees.¹²

(*e*) The memorandum must be signed by the party to be charged or by his agent. Signature by a broker as agent is sufficient.¹³ The place of signing is immaterial, and the name may be printed as well as written, if the printed name be

⁶ *Ryan v. U. S.*, 136 U. S. 83.

⁷ *Williams v. Woods*, 16 Md. 221. If the time and mode of payment be agreed upon, then the memorandum must state these terms. *Fisher v. Andrews*, 94 Md. 46.

⁸ *Kriete v. Myer*, 61 Md. 558.

⁹ *Walter v. Bloede Co.*, 94 Md. 80; *Warren v. Mayer Mfg. Co.*, 161 Mo. 112.

¹⁰ *Fisher v. Andrews*, 94 Md. 46.

¹¹ *Wain v. Warlters*, 5 East, 10; 2 Smith's Ldg. Cases, 1495.

¹² *Patmore v. Haggard*, 78 Ill. 607. See *post*, § 56.

¹³ *Williams v. Woods*, 16 Md. 220.

recognized by the party as his signature.¹⁴ A telegram is a sufficient memorandum and signing.¹⁵ It is not necessary that the memorandum should be signed by the party plaintiff suing on the contract.¹⁶

(f) The delivery of the memorandum to the other party by the one to be charged is not essential.¹⁷

(g) In some States the statute must be pleaded by way of defence in order to be available.¹⁸ But in others this is not necessary.¹⁹

(h) An agreement to rescind a contract previously made in conformity with the Statute does not require a writing.²⁰

(i) The agent who signs the memorandum need not be appointed in writing.²¹

CONTRACTS WITHIN THE FOURTH SECTION.

§ 54. **Promise by Executor.** (1) *A special promise by an executor or administrator to answer damages out of his own estate.* An executor is ordinarily liable for the debts of his decedent only *de bonis testatoris*, and the special promise contemplated by this section is one by which he binds himself *de bonis propriis*. The expression, "answer damages," is equivalent to paying the debts of the decedent, and therefore this clause of the statute is really comprehended within

¹⁴ *Drury v. Young*, 58 Md. 546. Making a mark is signing. *Zacharie v. Franklin*, 12 Pet. 161.

¹⁵ *Trevor v. Wood*, 36 N. Y. 511; *Smith v. Easton*, 54 Md. 139.

¹⁶ *Smith's Appeal*, 69 Pa. 480; *Easton v. Montgomery*, 90 Cal. 307; *Engler v. Garrett*, 100 Md. 387; *Gradle v. Warner*, 140 Ill. 123. But under the terms of the statute in some States, the memorandum must be signed by both parties.

¹⁷ *Drury v. Young*, 58 Md. 546; *Wood v. Davis*, 82 Ill. 311; *Gibson v. Holland*, L. R. 1 C. P. 1. It may be contained in a letter addressed to a third party. *Nicholson v. Dover*, 145 N. C. 18; 13 L. R. A. (N. S.) 168.

¹⁸ *Matthews v. Matthews*, 154 N. Y. 288; *Graffam v. Pierce*, 143 Mass. 386.

¹⁹ *Hamilton v. Thirston*, 93 Md. 213; *Morgart v. Smouse*, 103 Md. 463.

²⁰ *Brownfield v. Brownfield*, 151 Pa. 568; *Goss v. Lord Nugent*, 5 B. & Ad. 58.

²¹ *Moore v. Taylor*, 81 Md. 644; *Tibbetts v. Ry. Co.*, 153 Ill. 147.

the next relating to guarantees. If an executor, in consideration of the forbearance by a creditor of the estate to sue, promises in writing to pay the debt, he makes himself personally liable.¹ But a promise by an executor to pay an heir a sum of money if he will refrain from contesting the will is not within the statute, and does not require a writing.²

§ 55. **Guarantees.** (2) *Any promise to answer for the debt, default or miscarriage of another person.* This means a collateral undertaking to be responsible for a debt for which the other person continues to be liable. There must be three parties,—the creditor, the principal debtor, and his surety or guarantor.

Distinction between a guarantee and other joint obligations. In a contract of guarantee or suretyship the principal debtor and the guarantor are each liable for the whole debt, and although there is but one debt, there are two or more obligations by which it is secured. The creditor can recover the debt but once, but he has the choice of more than one obligation by which he may enforce it. A liability of this kind is distinguishable from the liability of two several debtors, or two joint tort-feasors. In the latter case the liability is *in solido*; each debtor is subject to a separate liability for the same object, and the obligations are independent. If the debt is paid by one of them the creditor has no ground of action against the other, simply because the debt no longer exists. A joint obligation, however, like that of a surety or guarantor, may be extinguished not only by payment, but by certain dealings between the creditor and the principal debtor. The liability of a surety is a conditional one, and the release of the principal debtor releases him; while in a solidary obligation the release of one debtor does not affect the liability of the others.*

What is not a guarantee. If the main object of the promisor is not to answer for the debt of another, but to sub-

¹ Cook v. Duval, 9 Gill, 462.

² Bellows v. Sowles, 57 Vt. 164.

*See *post*, Part v, ch. 5.

serve some purpose of his own, the contract is not within the statute, although it may be in form a promise to pay another's debt.¹ Where a contractor abandons work on a building, and the owner promises to pay the workmen the amounts due them by the contractor if they will proceed, the agreement is thus not within the statute.² If the party to whom the promise is made gives up, in consequence thereof, a demand against his original debtor, the contract is not to answer for the debt of another.³

Where one upon selling a security guarantees its payment, the promise is not such a guarantee as is contemplated by this clause.⁴ If goods are sold to A. upon the promise of B. to pay therefor, and credit is given only to B., the contract is not to answer for the debt of another.⁵ But where goods are delivered to one person at the request of another, in order to recover against the latter as the debtor, and not as a guarantor, it must be shown that credit was given to him exclusively.⁶ And so to constitute an original undertaking to pay for services to be rendered another, it is necessary that they should be rendered not only at the request, but also upon the credit, of the party promising to pay for them.⁷

The statute does not apply to a bill of exchange drawn by a debtor upon a third party in payment of the debt.⁸ The obligation of a *del credere* agent to be responsible to his principal for the debts of third persons with whom he deals as such agent is not a guarantee within the purview of the statute.⁹

In a guarantee, the promise is made to the creditor.¹⁰ Therefore a promise to the debtor to discharge a debt due by

¹ *Davis v. Patrick*, 141 U. S. 479; *Dryden v. Barnes*, 101 Md. 346; *Small v. Schaefer*, 24 Md. 161.

² *Andre v. Bodman*, 13 Md. 241.

³ *White v. Solomonsky*, 30 Md. 585; *Andre v. Bodman*, 13 Md. 241.

⁴ *Little v. Edwards*, 69 Md. 499.

⁵ *Conolly v. Kettlewell*, 1 Gill, 260, note (b).

⁶ *Norris v. Graham*, 33 Md. 56.

⁷ *Northern C. Ry. Co. v. Prentiss*, 11 Md. 119.

⁸ *Lafin v. Sinsheimer*, 48 Md. 411.

⁹ *Lewis v. Brehme*, 33 Md. 412; *Couturier v. Hastie*, 8 Ex. 40; *Sutton & Co. v. Grey* [1894], 1 Q. B. 285.

¹⁰ *Hardesty v. Jones*, 10 G. & J. 404; *Smart v. Smart*, 97 N. Y. 559.

him to a third person is not within the statute.¹¹ A joint promise by two persons in respect of a transaction for the benefit of one of them is not a guarantee.¹²

When one buys property and as part of the consideration agrees to pay a debt due by his seller to a third party, the agreement is not within the statute.¹³

The rule most generally adopted is that a contract of indemnity does not fall within this section, because the main object of the promisor is not to pay the debt of another. Thus a promise to serve a person harmless if he becomes an accommodation endorser for another is an original undertaking.¹⁴ "In one sense all guarantees, whether they come within section 4 or not, are contracts of indemnity. But the difference between those indemnities which come within the section and those which do not is very shortly thus expressed * * * The statute applies only to promises made to the person to whom another is already or is to become answerable."¹⁵

§ 56. Construction of Guarantees—Continuing Guarantee. Whether a guarantee is continuing or covers only the first transactions made under it, is a question of construction. In general it may be said that a letter guaranteeing the payment of purchases to be made by a party is confined to the first sales made upon its faith, and cannot be made to protect any and all subsequent sales.¹ Thus where defendant,

¹¹ *White v. Solomonsky*, 30 Md. 585; *Hardesty v. Jones*, 10 G. & J 404; *Bank v. Chalmers*, 144 N. Y. 132.

¹² *Oldenburg v. Dorsey*, 102 Md. 172.

¹³ *Fosha v. O'Donnell*, 120 Wis. 336.

¹⁴ *Jones v. Bacon*, 145 N. Y. 446; *Warren v. Abbet*, 65 N. J. L. 101. It is said in *Gansev v. Orr*, 173 Mo. 533, that contracts of indemnity are held to be within the statute in Alabama, Illinois, Ohio, Mississippi, North Carolina, South Carolina, Tennessee and Pennsylvania.

¹⁵ *Harburg India Rubber Co. v. Martin* [1902], 1 K. B. 778. In this case it was held that a promise by a director and large shareholder in a company to indorse bills for a debt due by it was within the statute, and was not a contract of indemnity or made to release property.

¹ *Boston Ice Co. v. Moore*, 119 Mass. 435; *Knowlton v. Hersey*, 76 Me. 345; *Columbian Co. v. Ganser*, 58 Mich. 385.

the guarantor, wrote to plaintiff saying: "Please deliver to H. goods as he may want from time to time, not exceeding in amount \$300. and if not paid for by him within thirty days, I will be responsible for the same," it was held that the guarantee was exhausted by H.'s first purchase of goods to the amount of \$300., and after they were paid for the guarantor was not liable for goods subsequently sold to H.²

Offer to guarantee. Where one makes a mere overture or offer to guarantee the transactions of another, he is entitled to notice of its acceptance before the contract is made; but in the case of an absolute guarantee, notice of acceptance is not necessary.³ Whether the writing is an absolute guarantee or a mere offer to guarantee, requiring the communication of the acceptance, is a question of construction.⁴

Discharge of guarantor. An enforceable agreement between the creditor and the principal debtor to extend the time of payment, or increase the risk, or materially alter the contract between them, discharges the guarantor if made without his consent.⁵ The foundation of this rule is that the surety has guaranteed the execution of a specified contract and to substitute a new one for it, without his consent, would be to make him liable upon a contract to which he has never agreed.⁶ So where B., by a contract under seal, agreed to be liable for goods sold to the principal in case the latter did not pay for the same within thirty days from date, and the creditor accepted from the principal promissory notes at sixty and ninety days for the indebtedness, it was held that defendant was discharged from liability as guarantor by such extension of time granted the principal debtor.⁷ But

² *Cutler v. Ballou*, 136 Mass. 337.

³ *Caton v. Shaw*, 2 H. & G. 14; *Mitchell v. Cleary*, 42 Md. 374; *Boyd v. Snyder*, 49 Md. 325; *Davis v. Wells*, 104 U. S. 159.

⁴ See *ante*, pp. 49, 50, notes 8 and 9.

⁵ *First Nat. Bank v. Gerke*, 68 Md. 449; *Smith v. State*, 46 Md. 617; *Hayes v. Wells*, 34 Md. 512. So a release of the debtor discharges the surety. *Gott v. State*, 44 Md. 341.

⁶ *Schaeffer v. Bond*, 72 Md. 501.

⁷ *Dixon v. Spencer*, 59 Md. 246.

mere delay by the creditor, if not unreasonable, does not discharge the guarantor.⁸

Consideration. Under the construction originally placed upon this section of the statute, it was declared to be necessary that the consideration for the promise of the guarantor should appear, either expressly or by necessary implication, upon the face of the writing.⁹ Thus where defendants wrote: "We recommend A. to B. and agree to be responsible for \$350 to B. to be forthcoming in thirty days after final delivery of the work," it was held that the guarantee was invalid because the consideration did not appear on its face, and that parol evidence was inadmissible to show that credit was given to A. on the faith of the writing.¹⁰

After a great amount of injustice had been done to creditors and unmerited favor shown to guarantors by this strained construction, the evil was remedied by statutes which provide that the consideration need not be stated in the memorandum, but may be shown by parol to have existed.¹¹

The promise of the guarantor must be founded upon a consideration like every other simple promise. In many cases the same consideration which supports the agreement of the principal debtor supports the guarantee.¹² But when the guarantee is made after the creation of the original debt, there must be some independent consideration.¹³ When the defendant, after the execution and delivery of a single bill by a third party wrote his name on the back, the holder is not authorized to write a guarantee over it.¹³ If the guarantee is written on a promissory note, parol evidence is

⁸ *Hooper v. Hooper*, 81 Md. 155. As to contribution between guarantors, see *Ellesmere Brewing Co. v. Cooper* [1896], 1 Q. B. 75; *Hooper v. Hooper*, *supra*. As to subrogation of guarantor, see *post*, Part 3, ch. 2.

⁹ *Ante*, § 53.

¹⁰ *Deutsch v. Bond*, 46 Md. 154.

¹¹ Md. Code, Art. 35, sec. 38; Mercantile Law Amendment Act of 1856 (19 & 20 Vict. ch. 97, § 3). In some States this construction of the statute was never followed.

¹² *Wyman v. Gray*, 7 H. & J. 409; *Beasten v. Hendrickson*, 44 Md. 609; *Garland v. Gaines*, 73 Conn. 666.

¹³ *Culbertson v. Smith*, 52 Md. 628.

admissible to show that it was made at the time of the execution of the note, in which case no additional consideration is necessary.¹⁴

It is not necessary that the person acting on the faith of a guarantee should have actually seen it.¹⁵ Whether he made advances in reliance upon it is a question of fact for the jury.¹⁶

§ 57. **Marriage Settlements.** (3) *Agreements made in consideration of marriage.* This means a promise to pay money or settle property in consideration of a marriage taking place, and not promises of marriage.¹ A letter from a man promising to make provision for a woman if she would marry him has been held to be a sufficient memorandum under the statute.² An oral promise made before marriage to make a settlement is invalid under the statute; and a promise in writing after the marriage is without consideration.³ But if the oral promise was made before marriage, the memorandum may be made afterwards.⁴ A promise to bequeath a sum of money to a woman in consideration of her marrying a certain person is within the statute.⁵ The statute does not prohibit the correction of a mistake in a marriage settlement by means of parol evidence.⁶

§ 58. **Interests in Land.** (4) *Contract or sale of lands, tenements, or hereditaments, or any interest in or concern-*

¹⁴ *Ordeman v. Lawson*, 49 Md. 135.

¹⁵ *Boyd v. Snyder*, 49 Md. 325.

¹⁶ *Lazear v. Nat. Union Bank*, 52 Md. 78.

¹ *Ogden v. Ogden*, 1 Bland, 284; *Richardson v. Richardson*, 148 Ill. 563; 26 L. R. A. 305; *Manning v. Riley*, 52 N. J. Eq. 39.

² *Offutt v. Offutt*, 106 Md. 236.

³ *Lloyd v. Fulton*, 91 U. S. 479.

⁴ *In re Holland* [1902], 2 Ch. 360. Anson asks (*Contracts*, 10th ed. p. 76), what is the consideration for a promise to make a settlement if given after the creation of an engagement to marry? For those who hold that the promise to perform an existing contract with a third person is a good consideration, the case of *Shadwell v. Shadwell*, cited *ante*, § 41, is an answer.

⁵ *Austin v. Kuehn*, 211 Ill. 113.

⁶ *Johnson v. Bragge* [1901], 1 Ch. 36.

ing them. The exposition of this clause of the statute belongs more especially to the law of real property, but some of the rulings on the subject may be noted here. In the first place as to what is not within the statute. A contract for the sale of growing crops, timber or other produce of the soil is a contract for the sale of goods, because they are then regarded as being constructively severed.¹

The Uniform Sales Act, which is in force in several States, follows sec. 62 of the English Sale of Goods Act (1893) in providing that the term "goods" shall include "emblemments, industrial growing crops, and things attached to or forming a part of the land which are agreed to be severed before sale or under the contract of sale." The effect of this statute is to take out of the fourth section many contracts heretofore regarded as being sales of interests in land, and bring them within the changed seventeenth section.

A contract between landlord and tenant concerning the erection of a building on the land is one for work and materials and not for an interest in land.² An agreement to furnish another with money to buy land is not within the statute;³ nor is an agreement by an agent to buy land in his own name for the benefit of his principal.⁴ A contract relating to land and not in writing is taken out of the statute by part performance, provided the acts of part performance appear to have been done in pursuance of the contract, and are of a substantial nature.⁵

¹ Leonard v. Medford, 85 Md. 66; Sentman v. Gamble, 69 Md. 293; Purner v. Piercy, 40 Md. 223; Smith v. Bryan, 5 Md. 141. But in some States a contract for the sale of growing timber and *fructus naturales*, not the result of culteration, is within the statute. White v. Foster, 102 Mass. 375. See Marshall v. Green, L. R. 1 C. P. D. 35.

² South Balto. Co. v. Muhlbach, 69 Md. 395.

³ Horner v. Frazier, 65 Md. 1. An agreement to buy and sell land and divide the profit is not within the statute. Morgart v. Smouse, 103 Md. 463; Bruns v. Spalding, 90 Md. 349. A contract to devise land in consideration of services rendered is within. Hamilton v. Thirston, 93 Md. 213.

⁴ Baker v. Wainwright, 36 Md. 336. But see Keller v. Keller, 45 Md. 269.

⁵ Billingslea v. Ward, 33 Md. 48; Bechtel v. Cone, 52 Md. 698; Ridgeway v. Ridgeway, 69 Md. 242; Semmes v. Worthington, 38 Md.

§ 59. **The Year Clause.** (5) *Agreements not to be performed within one year from the making thereof.* The construction placed upon this clause is extremely artificial and the following points are to be remarked:

(a) A full performance of the contract by one of the parties within the year will take it out of the statute, but a part performance will not have that effect.¹

(b) The statute does not apply if the contract can by any possibility be completed within a year, although the parties may have intended that its operation should extend through a much longer period and in fact it does so extend.²

298. The doctrine of part performance is not applicable to the other contracts mentioned in the 4th section. *Britain v. Rositer*, L. R. 12 Q. B. D. 123.

¹ *Horner v. Frazier*, 65 Md. 1; *Donellan v. Reed*, 2 B. & Ad. 899; *Cherry v. Heming*, 4 Ex. 631; *Erskine v. Adeane*, L. R. 8 Ch. 756; *Berry v. Doremus*, 30 N. J. L. 399. But the rule in some States is to the contrary. *Tiernan v. Granger*, 65 Ill. 351; *Kelley v. Thompson*, 175 Mass. 427. In *Reeve v. Jennings* [1910], 2 K. B. 527, there was a contract to serve as dairyman, determinable upon either party's giving one week's notice, and an agreement not to carry on that business for 36 months after leaving. This was held to be within the year clause, although capable of being performed on one side within a year. This ruling is against the weight of authority.

² *Peter v. Compton* (1693), Skinn. 353; 1 Smith's Ldg. Cas. 303; *Cole v. Singlerly*, 60 Md. 348; *Warren Co. v. Holbrook*, 118 N. Y. 586; *Blake v. Voight*, 134 N. Y. 69; *Durgin v. Smith*, 115 Mich. 39. In *Warner v. T. & P. R. Co.*, 164 U. S. 418, it was held that a contract to maintain a switch for a person so long as he needs it is not within the statute, although the switch was maintained for several years. An agreement made on December 6th, 1901, to employ plaintiff for one year beginning on December 7th is not within the statute, because the part of the day on which the contract was made is not to be included in the calculation of time. *Smith v. Gold Coast & Ashanti Co.* [1903], 1 K. B. 285. Defendant, on March 8th, while contemplating the purchase of a saw mill, said to the plaintiff, who was employed there: "If I buy this mill, I will employ you to take charge of it for a year." This offer was accepted. On March 10th plaintiff received a letter from the defendant, dated March 9th, saying that he had bought the mill and purposed putting plaintiff in charge. In April plaintiff was dismissed and sued to recover the salary for one year. It was held that in the absence of proof as to the precise time when the mill was bought the contract made on March 8th was not within the statute, since it might have been performed within a year. See also, *Baltimore Breweries Co. v. Callahan*, 82 Md. 106.

If performance by the promisor can be required by the other party within a year, the contract is not within the statute.³

An agreement by a grandfather to pay to the plaintiff, their stepfather, whatever expense the latter might incur in the education of two of the promisor's grandchildren, is not within the statute because the death of the children might occur before the lapse of a year and thus the agreement might possibly be fulfilled within a year.⁴ A contract to pay a lawyer for conducting litigation which might be completed within a year is not within the statute.⁵

Some cases make a distinction between an agreement for a lease and the lease itself, and hold that no agreement for a lease for a year, the term to commence within a year in the future, is not within the statute.⁶

(c) The statute does not apply if the death of one party within the year would leave the contract fully performed and its purpose achieved. Therefore an agreement not to engage in a certain business for five years is not within this clause, because the death of the promisor within a year would leave the contract fully carried out.⁷

An agreement to marry is not within the year clause.⁸ At the time the statute was enacted no action for breach of such contract would lie at common law, but the remedy of the aggrieved party was in the ecclesiastical court.

A contract for the sale of goods to be performed after the expiration of a year is within this clause of the statute, and

³ *Walker v. Johnson*, 96 U. S. 424.

⁴ *Ellicott v. Peterson*, 4 Md. 476.

⁵ *McPherson v. Cox*, 96 U. S. 404. See note appended to *White v. Fitts*, 15 L. R. A. (N. S.) 313, collecting cases as to the effect of the statute upon parol contracts for services which may but are not intended to be performed within a year.

⁶ *Whiting v. Ohlert*, 52 Mich. 462; *Ward v. Hasbrouck*, 169 N. Y. 407. *Contra*: *Wheeler v. Frankenthal*, 78 Ill. 124.

⁷ *Doyle v. Dixon*, 97 Mass. 268; *Reed v. Gold*, 103 Va. 37.

⁸ *Lewis v. Tapman*, 90 Md. 294; *Blackburn v. Mann*, 85 Ill. 222; *Brick v. Gannor*, 36 Hun, 52. *Contra*: *Nichols v. Weaver*, 7 Kan. 373; *Derby v. Phelps*, 2 N. H. 515; *Ullman v. Myer*, 10 Fed. Rep. 241.

is not taken out of it by the acceptance and receipt of part of the goods.⁹

A promise that if another party will buy a certain steamer, the promisor will make a contract to use it for three years is within the statute.¹⁰

A contract to pay for a certain chattel in instalments, the last fourteen months from its date, is within the statute,¹¹ and so is a contract to supply a saw mill with timber for two years.¹² The agreements often found to be within this clause are those for service, where the term is for more than a year or is to begin at a future time.¹³ If the term of service is indefinite, the contract is not affected by the statute.¹⁴

But where one has rendered services under a contract not enforceable because not in writing, he is entitled to recover for them under a *quantum meruit*, and it cannot be set up in defence that he violated the contract by quitting the service before the expiration of the stipulated time.¹⁵

§ 60. **Contracts for the Sale of Goods.** The original statute of 29 Car. II, ch. 3, sec. 17, provided that:

No contract for the sale of any goods, wares and merchandises for the price of ten pounds sterling and upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give some-

⁹ *Prested Miners Co. v. Garner* [1910], 2 K. B. 776.

¹⁰ *Green v. Penn. Steel Co.*, 75 Md. 109. In *Packet Co. v. Sickles*, 5 Wallace, 588, where the contract was to pay a certain sum annually for the right to use a patented invention on a boat during the term of the patent having twelve years to run, it was held to be within the statute, although a certain contingency,—the loss or destruction of the boat,—might terminate it within a year. The loss of the boat would leave the original contract uncompleted, but put an end to liability under it.

¹¹ *Tiernan v. Granger*, 65 Ill. 351.

¹² *Pattin v. Hicks*, 43 Cal. 509.

¹³ *Chase v. Hinkley*, 126 Wis. 75; 2 L. R. A. (N. S.) 738.

¹⁴ *Carnig v. Carr*, 167 Mass. 544; *Peter v. Compton*, 1 Smith's Ldg. Cas. 303.

¹⁵ *Baker v. Lauetrbach*, 68 Md. 64. See also, as to recovery for benefit conferred, *Warden v. Sharp*, 56 Ill. 104; *Dix v. Marcy*, 116 Mass. 416; *Miller v. Roberts*, 169 Mass. 134.

thing in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such a contract, or their agent thereunto lawfully authorized.

The Uniform Sales Act, in force in several States, has altered and added to this section in a different way from the English Sale of Goods Act (1893).

The latter statute provides as follows:

4—(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

The American statute provides as follows in some States:

(1) A contract to sell or a sale of any goods or choses in action of the value of fifty dollars¹ or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be

¹ In some States this amount has been increased. The Maryland Act of 1910, ch. 346, mentions \$50.

intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

In all cases under the fourth section of this statute a writing is necessary to the enforceability of the contract, but under the seventeenth any one of the following circumstances is as effectual: (a) Acceptance and receipt of part of the goods. (b) Payment of part of the price. (c) Giving something in earnest to bind the bargain.

Under the original statute there was much diversity in the rulings as to whether a contract under which the seller was to perform some work and labor upon the thing sold before the property was transferred was within the statute as being a contract for the sale of goods, or not within it as being a contract for work and labor or a mixed contract of sale and work. The statute codifies the rule as finally established in England, that when the contract is such that a chattel is ultimately to be delivered by the seller, then the cause of action after delivery is for goods sold and delivered.²

Acceptance and receipt. The American statute codifies the construction which had been placed in some jurisdictions upon the provision of the 17th section relating to acceptance and receipt. These are distinct things and both are essential. The decisions upon this subject are very numerous. In

² Lee v. Griffin, 1 B. & S. 272. In Maryland, where the seller was to bestow some work upon the thing sold before delivery the contract was held not to be within the 17th section. Grove v. Reutch, 27 Md. 188; Eichelberger v. McCauley, 5 H. & J. 213.

one case, A. orally agreed to buy from B. 200 barrels of apples, and directed them to be shipped to him at a certain place by a designated schooner. The vessel was delayed, and A. refused to accept more than four barrels, which the supercargo declined to let him have unless he would pay freight for the whole. In an action by the seller for the price it was held that this section of the statute was a bar to a recovery.³ The Court said: "The statute does not speak of delivery, but superadds to the delivery which the common law requires, acceptance of the goods or some part of them by the purchaser. It confers upon the buyer alone the privilege of preventing a consummation of the contract. In order to satisfy the statute there must be a delivery of the goods with intent to vest the right of possession in the vendee, and there must be an actual acceptance by the latter with intent to take possession as owner. Whether the buyer has accepted or not depends upon the fact and circumstances of each separate transaction." It was also ruled in this case that the fact that the buyer has designated a particular vessel as the carrier did not constitute it an agent with power to accept and receive.

The delivery of goods to the purchaser and the unpacking of them by him are not a sufficient acceptance if it appears that he has taken them and had them in his possession for no greater time than was reasonably necessary to enable him to examine their quantity and quality and to declare his approval or disapproval.⁴

³ *Jones v. Mechanics Bank*, 29 Md. 287. See also, *Jarrell v. Young*, 105 Md. 280. The taking away by the buyer of samples is not an acceptance and receipt of part of the goods. *Richardson v. Smith*, 101 Md. 15.

⁴ *Hewes v. Jordan*, 39 Md. 472. In 1 *Law Quarterly Review*, 1, there is a vigorous, but one-sided, criticism by Sir James Stephen upon the ethical effect of this section of the statute.

CHAPTER V

CAPACITY OF PARTIES

The normal condition of all parties is one in which they are capable of making any contract. But certain classes of persons are under a disability to contract, either total or partial, which is abnormal. This disability may arise from political status, infancy, lunacy, &c.

§ 61. **Alien Enemies.** An alien enemy can make no contract with a citizen of this country during the continuance of hostilities. His right to enforce contracts made *ante bellum* are suspended, but, since the plea of alien enemy goes only to the disability of the plaintiff, the right to proceed against him continues to exist.¹

§ 62. **Contracts of Infants.** All persons under the age of twenty-one years were placed by the common law under a qualified disability to contract. Some of the earlier cases divide the contracts of infants into the three classes of void, voidable and binding. But the later cases state the rule to be that the contracts of infants other than for necessities are not void, but only voidable, and hence capable of ratification.¹

The rights and liabilities of infants under contracts made by them can be best discovered by considering: (1) Their contracts for necessities; (2) Their contracts not relating to

¹ *Hanger v. Abbott*, 6 Wallace, 532; *Armstrong v. Toler*, 11 Wheat. 258; *Whelan v. Cook*, 29 Md. 1; *Dorsey v. Kyle*, 30 Md. 512; *Dorsey v. Thompson*, 37 Md. 25.

¹ *Ridgely v. Crandall*, 4 Md. 441; *Chew v. Bank*, 14 Md. 318. But a power of attorney executed by an infant is void and incapable of ratification. *Wainwright v. Wilkinson*, 62 Md. 146. The English Infant's Relief Act of 1874 declares void, and incapable of ratification after coming of age, all contracts of infants except certain specified ones.

land and not for necessities, classifying these accordingly as they are executed or executory; and, (3) The contracts and conveyances of infants relating to land.

(1) *Contracts for necessities.* The contracts of an infant for necessities, such as board, apparel, medical aid and instruction, suitable to his circumstances in life are binding and upon these, if executed on the part of the plaintiff, he may be sued and charged in execution.² Nothing is necessary for an infant if he has already been supplied with similar articles, and it is immaterial that the plaintiff did not know of the existing supply.³

The American Uniform Sales Act, following section 2 of the English Sale of Goods Act (1893), provides that where necessities are sold and delivered to an infant he must pay a reasonable price therefor. Also that "necessaries" means goods suitable to the condition in life of such infant and to his actual requirements at the time of delivery.

In an action to recover for goods sold to an infant, the plaintiff must prove that the articles were necessities suitable for the infant, and also that he had not, at the time, an adequate supply of such articles from other sources.⁴

When necessities have been properly supplied the liability of the infant is not for the contract price, but for their reasonable value.⁵ Although it is customary to speak of the contract for necessities as being valid, the liability of the infant under it is in quasi-contract for the benefit conferred. "An infant, like a lunatic, is incapable of making a contract of purchase in the strict sense of the words; but if a man satisfies the needs of the infant or lunatic by supplying to him necessities, the law will imply an obligation to repay

² *Monumental Ass'n. v. Herman*, 33 Md. 131.

³ *Levering v. Heighe*, 2 Md. Ch. 81, note, and cases cited in note *infra*.

⁴ *Johnstone v. Marks*, 19 Q. B. D. 509; *Nash v. Inman* [1908], 2 K. B. 1. In *Lynch v. Johnson*, 109 Mich. 640, it was held that the burden of proof was upon the infant to show that he had been supplied with the necessities for which the action is brought.

⁵ *Trainer v. Trumbull*, 141 Mass. 527; *Gregory v. Lee*, 64 Conn. 407. This is also provided by the statute.

him for the services so rendered, and will enforce that obligation against the estate of the infant or lunatic. The consequence is that the basis of the action is hardly contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of the needs satisfied. In other words, the obligation arises *re* and not *consensu*.”⁶

(2) *Contracts not for necessities*. All contracts other than for necessities made between an infant and an adult are binding upon the adult, but voidable at the option of the infant, subject to the following limitations:

(a) A contract executory on both sides may be rescinded at the will of the infant.⁷ So an infant may avoid a *supersedeas*.⁸

(b) If the contract has been executed on both sides, the infant may disaffirm it, but cannot, in cases other than a conveyance of land, do so without restoring the consideration received by him, and if the infant cannot restore the consideration the right to rescind is lost.⁹ So, if an infant buys a

⁶ Fletcher Moulton, L. J., in *Nash v. Inman* [1908], 2 K. B. 8.

⁷ *Rush v. Wick*, 31 Ohio, 521. This was a contract to marry. In *Ditcham v. Worrall*, 5 C. P. D. 410, “D. and W., both infants, agreed to marry each other, but there was no definite understanding as to the date of their wedding until after both had come of age. W. then asked D. to fix the wedding day, which she did. Afterwards W. broke off the engagement and was sued by D. *Held*, by two judges out of three, the request to fix the day, which was complied with, amounted to a new contract, and therefore judgment must be given for D. The third judge considered that fixing the day was merely a ratification of the original agreement to marry.” Potts’ Summary of the Law of Contract, 619. This case must be taken in connection with the Infant’s Relief Act, mentioned above in note 1.

⁸ *Tiernan v. Hammond*, 41 Md. 548.

⁹ *Latrobe v. Dietrich*, 114 Md. 8; *Wilhelm v. Hardman*, 13 Md. 140; *Adams v. Beall*, 67 Md. 53; *Ruchizky v. De Haven*, 97 Pa. 210; *Rice v. Butler*, 160 N. Y. 578; *White v. New Bedford Co.*, 178 Mass. 20; *Bartlett v. Cowles*, 15 Gray, 446; *Miller v. Smith*, 26 Minn. 248. But some cases hold that the infant may disaffirm and recover what he paid, although he cannot put the other party in *statu quo*. *Waller v. Chicago G. Co.*, 241 Ill. 398; *Neilson v. Internat. Co. (Me.)*, 75 Atl. 330. And see *Simpson v. Prudential Ins. Co.*, 184 Mass. 348.

horse and pays for it, he may, by returning, or offering to return it, rescind the contract and recover the purchase money.¹⁰

(c) If the contract has been executed on the part of the adult only, it cannot be enforced against the infant, although he has received the benefit of the transaction. If, however, in such case the infant has in his possession any article received under such contract, the adult is entitled to recover it in the event of disaffirmance, but if the infant has parted with the consideration he may disaffirm without making compensation.¹¹

(d) If the contract has been executed on the part of the infant only, he may disaffirm and recover the consideration moving from him.¹²

(e) Contracts relating to his personal service may be avoided by the infant, and he may recover the value of his services without deduction for his breach of contract.¹³

(f) An infant may avoid his contracts relating to personal property or personal services during his minority, or within a reasonable time thereafter.¹⁴

(g) An infant may be the partner of an adult, with the rights and powers of a partner, but he cannot be held indi-

¹⁰ *McCarthy v. Henderson*, 138 Mass. 310; *House v. Alexander*, 105 Ind. 109. No allowance will be made for depreciation in the value of the article. *Price v. Furman*, 27 Vt. 268.

¹¹ *Carr v. Clough*, 26 N. H. 280; *Badger v. Phinney*, 15 Mass. 359; *Walsh v. Young*, 110 Mass. 399. After an infant has paid part of the purchase price of an article sold to him on the instalment plan and it has been taken from him by the seller upon a default, the infant may recover the amount paid by him. *Gillis v. Goodwin*, 180 Mass. 348. When an infant avoids his policy of life insurance, he may recover the premiums paid by him. *Simpson v. Prudential Ins. Co.*, 184 Mass. 348.

¹² *Monumental Ass'n. v. Herman*, 33 Md. 133.

¹³ *Deroeher v. Continental Mills*, 58 Me. 217; *Gaffney v. Hayden*, 110 Mass. 137; *Vent v. Osgood*, 36 Mass. 572; *Ray v. Haines*, 52 Ill. 485. In *Mutual Milk Co. v. Prigge*, 112 N. Y. App. Div. 652, an infant was enjoined from soliciting the plaintiff's customers in violation of his contract.

¹⁴ *Adams v. Beall*, 67 Md. 53; *Bradford v. French*, 110 Mass. 366; *Bool v. Nix*, 17 Wend. 119.

vidually liable for the contracts of the firm unless he affirms them after reaching majority. In such case, however, Equity may dissolve the partnership and appoint a receiver upon the application of the adult partner.¹⁵

(h) An infant is liable for his torts and injuries, but a mere breach of contract cannot be treated as a tort so as to make him liable.¹⁶

(i) The contract of an infant ceases to be voidable if he ratifies it after coming of age. The affirmation must be made with full knowledge of the facts.¹⁷ Mere acquiescence is not generally sufficient to establish a ratification.¹⁸ Where the contract relates to the sale of goods, retaining and using them after attaining majority is evidence of affirmation.¹⁹

(3) *Contracts relating to land.* The deed or conveyance of an infant is voidable only.²⁰ An infant may upon coming of age avoid his contract relating to land, or his conveyance thereof, without restoring the consideration he has received;²¹

¹⁵ *Bush v. Linthicum*, 59 Md. 349.

¹⁶ *Eaton v. Hill*, 50 N. H. 235. Most cases hold that an infant is not liable because he falsely represented himself as being of age. *Sleytin v. Barry*, 175 Mass. 513. *Cf. Sims v. Everhart*, 102 U. S. 300; *Neff v. Landis*, 110 Pa. 204. Such fraud does not estop the infant from pleading his infancy. *Wieland v. Kobick*, 110 Ill. 16; *Merriam v. Cunningham*, 11 Cush. 40. Where the infant by false representations as to his age, obtains a loan which he executes a mortgage to secure, he cannot ask a Court of Equity to vacate the mortgage on the ground of infancy. *Ostrander v. Quin*, 84 Miss. 235. See cases in note 21, *infra*.

¹⁷ *Trader v. Lowe*, 45 Md. 1. There are a great many cases as to ratification and disaffirmance by infant, turning generally upon the facts of the particular case. Some contracts are held to be valid unless expressly repudiated.

¹⁸ *Irving v. Irving*, 9 Wallace, 618. See also, *Hall v. Jones*, 21 Md. 439; *Glenn v. Clark*, 53 Md. 580.

¹⁹ *Bryden v. Bryden*, 9 Met. 517.

²⁰ *Amev v. Cockey*, 73 Md. 297. In this case it was held that an infant was bound by a deed of equal partition.

²¹ *Brawner v. Franklin*, 4 Gill, 463; *Green v. Green*, 69 N. Y. 553. If an infant executes a deed of trust of land to secure a loan used for the purpose of improving the land or to discharge prior liens on it, the lender is entitled, upon the distribution of the proceeds of a sale of the land, to the amount expended for those purposes, after making an allowance to the infant of the value of the land as it was

unless, perhaps, he then has it in specie.²² The disaffirmance by an infant must be within a reasonable time after reaching his majority.²³ A conveyance by the infant of the same property to another party is a disaffirmance.²⁴ The avoidance may be during minority as well as afterwards, but disaffirmance during infancy cannot be required.²⁵ After coming of age the deed of an infant may be ratified as other contracts are.²⁶

§ 63. **Contracts of Lunatics.** The contract of a lunatic, *i. e.*, a person incapable of understanding the nature and effect of the particular contract, is voidable and not void.¹ An executory contract will not be enforced against him.² But an executed contract which is fair, reasonable, and made with a person unaware of his lunacy, will not be rescinded if the parties cannot be placed *in statu quo*, and the lunatic has had

before the improvements. *MacGreal v. Taylor*, 167 U. S. 688. If an infant executes a purchase money mortgage of the land he buys he cannot repudiate the mortgage and at the same time keep the property. *Thurston v. Nottingham, etc., Building Society* [1901], 1 Ch. 88. See also, *Hamilton v. Vaughan Co.* [1894], 3 Ch. 589; *Valentini v. Canali*, 24 Q. B. D. 166. The transaction constituted by the deed and the mortgage must be affirmed or avoided as a whole. *Cogley v. Cushman*, 16 Minn. 397; *Ottman v. Moak*, 3 Sandf. Ch. 431. As to holding on to property and repudiating the contract, see also *Evans v. Morgan*, 69 Miss. 328.

²² *Chandler v. Simmons*, 97 Mass. 508; *Mustard v. Wohlford*, 15 Gratt. 329.

²³ *Amey v. Cockey*, 73 Md. 297. As to ratification on coming of age, see *Ready v. Pinkham*, 181 Mass. 351.

²⁴ *Tucker v. Moreland*, 10 Pet. 58.

²⁵ *Monumental Ass'n. v. Herman*, 33 Md. 131. In most States the conveyance cannot be avoided until after reaching majority. See note to *Levering v. Heighe*, 3 Md. Ch. 81.

²⁶ *Sims v. Everhart*, 102 U. S. 309.

¹ *Chew v. Bank*, 14 Md. 318; *Riley v. Carter*, 76 Md. 595. The contract may be avoided by the lunatic upon recovering his reason, or by his committee or personal representatives. *Turner v. Rusk*, 53 Md. 65; *Campbell v. Kuhn*, 45 Mich. 513.

² *Chew v. Bank*, 14 Md. 300; *Musselman v. Craven*, 47 Ind. 1. The English rule is that the contracts of a lunatic, both executory and executed, are binding upon him unless it be shown that the other party was aware of his insanity. *Imperial Loan Co. v. Stone* [1892], 1 Q. B. 601.

the benefit of the consideration.³ The deed of a lunatic is voidable in equity, but the consideration must be returned if the grantee was a *bona fide* purchaser.⁴

If the lunacy was known to the other party, the contract is voidable at the option of the lunatic, but is binding upon such other party.⁵ A lunatic may be sued upon a contract made by him when sane;⁶ and a mortgage executed by him before insanity may be foreclosed thereafter.⁷

An inquisition of lunacy is notice, actual or constructive, to all parties dealing with the lunatic, and the contract of a person adjudged to be insane cannot be enforced against him.⁸

A lunatic is liable, *quasi ex contractu*, for necessities supplied him.⁹

§ 64. **Contracts of Drunken Persons.** A contract made by a person so intoxicated at the time as not to know what he is doing, or the consequences of his acts, is voidable at the option of such person.¹ Whether the intoxication in any particular case is sufficient to deprive a person of the capacity to contract depends upon its own circumstances.² If the intoxication was known to the other party, or was procured by such party, equity will the more readily relieve from the

³ *Flack v. Gottschalk Co.*, 88 Md. 368; *Brigham v. Fayerweather*, 144 Mass. 48; *Young v. Stevens*, 48 N. H. 133; *Scanlon v. Cobb*, 85 Ill. 296; *Ins. Co. v. Blankenship*, 94 Ind. 535.

⁴ *Evans v. Horan*, 52 Md. 602. It was held in *Odom v. Riddick*, 104 N. C. 515, that the deed of a lunatic duly recorded could not be avoided as against *bona fide* purchasers.

⁵ *Allen v. Berryhill*, 27 Iowa, 534.

⁶ *Stigers v. Brent*, 50 Md. 214.

⁷ *Berry v. Skinner*, 30 Md. 567.

⁸ *Flack v. Gottschalk Co.*, 88 Md. 368.

⁹ *McCormick v. Littler*, 85 Ill. 62; *Van Horn v. Hann*, 39 N. J. L. 207. And it is so provided in the Uniform Sales Act.

¹ *Johns v. Frithcey*, 39 Md. 259; *Hewitt's Appeal*, 55 Md. 514; *Reinicker v. Smith*, 4 H. & J. 422; *Bush v. Breinig*, 113 Pa. 310; *Watson v. Doyle*, 130 Ill. 415.

² *Conley v. Nailor*, 118 U. S. 127.

deed or contract.³ Contracts made by a man when drunk may be ratified by him when sober, and he cannot afterwards avoid them, and such contracts are binding upon those who contract with him, whether they knew or did not know his condition.⁴

A transfer of shares of stock, procured from the owner while so intoxicated as to be incapable of transacting business, by fraud, with knowledge of his condition, and for a grossly inadequate consideration, will be set aside in equity; and if, without any fault of his, he is unable to restore the consideration, provision for its repayment may be made in the final decree.⁵

³ *Griffith v. Fred. Co. Bank*, 6 G. & J. 424; 2 Pomeroy Eq. Jur. § 249.

⁴ *Zoest v. Williams*, 42 Ind. 565; *Matthews v. Baxter*, L. R. 8 Ex. 132.

⁵ *Thackrah v. Haas*, 119 U. S. 499.

CHAPTER VI

MISTAKE

§ 65. **The Consent May be Vitiating.** The parties to a contract may be competent, and may appear to have consented to the same thing, but the apparent consent of one or of both may have been given under such circumstances as make it no true expression of their will. These circumstances exist when there has been mistake, misrepresentation, fraud, duress or undue influence.

In the cases in which a party is allowed to show that his real will or purpose did not correspond with the declaration made by him, the contract is either void or voidable. If his consent has been obtained by the fraud of the other party, he has indeed consented because under a mistake, but the rights of a defrauded party are greater than in a mere case of mistake, and therefore the unreality of the consent in this instance is treated exclusively from the point of view of fraud. A contract obtained by fraud, as well as one obtained by duress or undue influence, is voidable at the option of the party upon whom the fraud, etc., has been practiced. He may either repudiate it or affirm it as he may choose, the other party being bound. But when the apparent agreement has been caused by such a mistake as is deemed essential, since it is not produced by active fraud, and is in some cases common to both parties, the contract is void because not really consented to, and neither party can take advantage of it.

§ 66. **Mistake in General.** The kinds of mistake to be considered are those which prevent the formation of a valid contract, and not a mistake in the mere expression of that which has been agreed upon. If a written contract fails to express accurately the agreement actually made, on account of the mistake of the draftsman, it may be reformed in equity so as to correspond with the real will.¹

¹ Wood v. Patterson, 4 Md. Ch. 335, note; Keedy v. Nally, 63 Md. 311; Stiles v. Willis, 66 Md. 552; Boulden v. Wood, 96 Md. 332. This is one of the chief heads of equitable jurisdiction.

A mistake affecting the formation of a contract exists when there is a lack of conformity between our ideas and the reality of things. It may consist in believing that to be true that is false, or in believing to be false that which is true, or in supposing a thing to exist which does not exist, or in supposing a thing to be of a different nature from what it really is. A mistake is not quite the same thing as ignorance, in which case one does not positively believe that to be true which is false. Ignorance does not know, but mistake thinks that it does know when it does not.² When one has entered into a contract on account of a mistake, it may be of such a character as to exclude the notion of any real agreement, or it may be such as to invalidate the consent. In the latter instance, consent has been given, but it is vitiated by the mistake.

There are many other instances in which mistake is a controlling factor in the determination of legal rights. One of the most important judicial facts is, for example, the good faith of one in certain transactions. Its basis, however, is error or ignorance. Mistake is also a ground for the recovery back of money paid on account of ignorance or error as to facts, as when a debt is supposed to exist but does not really exist.³

But where the formation of a contract is concerned there are only a few cases in which a man is permitted to allege that he said one thing and meant another, when a contract has been made with him upon the faith of what he did say; or in which either party is permitted to show that their mutual assent is vitiated by some common and fundamental error.

Thus if a seller exhibits by mistake a wrong sample, a contract made upon the faith of it by the other party is valid.⁴ But if the other party knows that the mistake was

² Compare the case of the uncut diamond with that of the barren cow mentioned in § 71, *infra*.

³ *Baltimore City v. Lefferman*, 4 Gill, 425; *Dernburg*, *Pandekten*, I, § 87.

⁴ *Scott v. Littledale*, 8 El. & B. 815.

made, or that the offer which he accepts was not the true expression of the offerer's purpose, the contract is void.⁵ The principal kinds of mistake affecting the formation of the contract are the following:

§ 67. **Mistake as to the Nature of the Transaction.** This is often, but not always, caused by the misrepresentation of the other party, not amounting to fraud, or by the misrepresentation of a third party. Thus where a man signed a paper supposing it to be a contract of agency, when it was really a promissory note, it was held to be void.¹ If an uneducated man signs, without reading it, a paper presented to him by a person in whom he has great confidence, supposing it to be of an entirely different tenor from what it really was, he is not bound.²

There may be in one sense a mistake as to the nature of the transaction when the parties misunderstand one another, as, for instance, when one party intends a gift and the other a loan. Thus, Ulpian says:³ "If I hand you money by way of making you a gift, and you accept it by way of a loan, then, as was said in Julianus, there is no gift made; but the question whether there is a loan is a point to consider. My own opinion is that there is no loan either, and on the whole I should say, the money does not become the property of the person who took it, as his view of the transaction when he took it was not the same as mine."³

But if the parties are agreed as to the transaction and are only mistaken as to its legal consequences, this makes no difference. When one makes a certain kind of contract, or does certain acts, the law attaches rights and liabilities to the transaction independently of the expressed intention of the parties.

⁵ *Paget v. Marshall*, 28 Ch. D. 255. Sometimes knowledge by one party of a mistake made by the other whose offer he accepts amounts to fraud. *May v. Platt* [1900] 1 Ch. 616.

¹ *Kagel v. Totten*, 59 Md. 447.

² *O'Brien v. Pentz*, 48 Md. 562; *Schafer v. Schafer*, 84 Ill. 603.

³ Dig. 12, 1, 18 (Monro).

Where the proof shows that a party executed a release of a mortgage which had not been paid, intending to release another mortgage which had been paid, equity relieved against the consequences of the mistake.⁴ In this case the question arose between the immediate parties to the transaction. Where the rights of other parties, who have acted upon the faith of the document, are involved, the party making the mistake as to its nature must generally bear the consequences. So, if a man signs without reading it an instrument sent to him by his lawyer, gratuitously supposing it to be a paper of a different character, he is not entitled to relief.⁵ Where the maker of a promissory note is able to read, but, relying upon the representations made to him, neglects to do so, and is really unaware of the nature of his act, he is nevertheless liable to a *bona fide* holder for value.⁶

It has been held, however, in some cases that one who by fraud is induced to sign a promissory note, thinking that he was witnessing a person's signature to a document or that the instrument is of a different character, is not liable on it even to a *bona fide* holder for value, provided he was not negligent.⁷

C., who owed money to B., by making certain misrepresentations to A. induced A. to deliver goods to B. It was supposed by A. that he was selling them in the ordinary course of

⁴ *Bond v. Dorsey*, 65 Md. 310. When a judgment creditor signs a paper directing the judgment to be entered "satisfied" under a mistake and believing that he is signing a paper of a different tenor, and the judgment debt remains unpaid, the Court will order the entry of satisfaction to be struck out, when the interests of third parties are not thereby injuriously affected. *Wilmer v. Brice*, 91 Md. 71.

⁵ *Kennerly v. Etiwan Co.*, 21 S. C. 226; *Cannon v. Lindsay*, 85 Ala. 198. See *Comegys v. Clark*, 44 Md. 108.

⁶ *Upton v. Tribilcock*, 91 U. S. 50; *Johnston v. Patterson*, 114 Pa. 398; *Chapman v. Rose*, 56 N. Y. 137.

⁷ *Foster v. Mackinnon*, L. R. 4 C. P. 711; *Lewis v. Clay*, 67 L. J. Q. B. 224. The former case has been much criticised and is probably bad law. As a matter of practice, when an action is brought on a note so obtained it is difficult for the plaintiff to convince a jury that he took the note without any notice of the defect in its origin. The burden of proof is cast upon the plaintiff when such defence is made. *Stouffer v. Alford*, 114 Md. 110; *Arnd v. Heckert*, 108 Md. 300.

business to B. and it was supposed by B. that the goods were delivered in settlement of C.'s indebtedness to him. Upon discovering the mistake, A. sued C., who had disposed of the goods. It was held that, although A. could have taken the goods if they had remained in C.'s possession and were distinguishable, yet he could not recover their value *ex contractu*, because there was no agreement between him and B. nor *quasi ex contractu* upon the ground of benefit conferred.⁸ "There is no equitable reason," said the Court, "why the plaintiff rather than the defendant should be relieved from the consequences of their trust in C. The defendant's equity is at least equal to that of the plaintiff."

§ 68. **Mistake as to the Person with Whom the Contract is Made.** This only avoids the contract when it is material for one party to know with whom he is contracting, and when he has a definite person in view. Thus A. who had bought ice from B. ceased to take it on account of dissatisfaction with B., and contracted for ice with C. Subsequently B. bought C.'s business and delivered ice to A. without notifying him of his purchase until after the consumption of the ice. It was held that B. could not maintain an action for the price of the ice against A.¹

A man who carried on business under the name of the Cambria Coal Co. made a contract in that name with the defendant, who thought that he was dealing with a corporation having a capital stock, while in reality there was no such corporation. Upon learning this fact, the defendant repudiated the agreement. It was held that he had no right to do so, because he intended to deal with the Cambria Coal Company, and not with the individual trading under that

⁸ Concord Coal Co. v. Ferrin, 71 N. H. 35.

¹ Boston Ice Co. v. Potter, 123 Mass. 28. A similar case in Boulton v. Jones, 2 H. & N. 564, where the person giving an order for goods had a set-off against the shopkeeper to whom it was addressed. In both cases A.'s offer to B. was accepted by C. under circumstances where A. had a reason for wishing to contract with B. and not with C.

name, and that consequently the contract was void on account of the defendant's mistake as to the identity of the person with whom the contract was made.²

If A. purchases ore of B., and without his knowledge C. delivers his ore in fulfilment of B.'s contract, the relation of vendor and purchaser does not exist between A. and C. In such case, after demand and refusal, however, or actual conversion, trover lies, or after sale of the ore by A. the tort may be waived and assumpsit maintained by C.³

But it would seem that where goods are ordered of one person and supplied by another, the latter has no claim against the purchaser *ex contractu*, unless he appropriates them after notice of the substitution, in which case he assents to the change.⁴

When the mistake as to the identity of the person is caused by the latter's fraudulent representations, there is some doubt as to whether the contract is void upon the ground of mistake or only voidable upon the ground of fraud, *i. e.*, whether the deceived party makes a contract or does not make a contract. The question is important, because if the contract is only voidable, then *bona fide* purchasers from the person causing the mistake acquire a good title, while if the contract is void they do not. In the case of fraud generally a contract is made, because the party really gives his consent, and the fraud concerns merely the motive or ground. In a Massachusetts case,⁵ it was held that if A. fraudulently represents to B. that he is C., a merchant known by reputation to B. as a responsible person, and thereby induces B. to sell him

² *Fifer v. Clearfield Coal Co.*, 103 Md. 1.

³ *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184.

⁴ *Barnes v. Shoemaker*, 112 Ind. 512; *Carroll v. Benedictine Society*, 88 Md. 317.

⁵ *Edmunds v. Merchants' Transp. Co.*, 135 Mass. 283. If A. falsely represents to the drawer that he is B. and thus obtains possession of a check payable to B. which is cashed by the bank on which it is drawn, the loss caused by the fraud falls on the drawer of the check, and not on the bank. *Land Title & Trust Co. v. N. W. Bank*, 196 Pa 230; 50 L. R. A. 75.

goods, the sale is voidable only for fraud and not void for mistake.

But in *Cundy v. Lindsay*,⁶ where a man named Blenkarn, by imitating the signature of a reputable merchant named Blenkiron, induced plaintiff to sell him goods, the plaintiff supposing he was selling to Blenkiron, it was held that there was no sale, and that plaintiff was entitled to recover the value of the goods from *bona fide* purchasers to whom Blenkarn had transferred them. The only difference between these two cases is that in the former the personation was by word of mouth and in the latter by letter. In the former case the Court said that the vendor's intention "was to sell to the person present and identified by sight and hearing. The assumption of a false name is like any other fraud." It seems impossible to distinguish these cases upon any sound principle.

Cundy v. Lindsay is also in conflict with a case in which it appeared that X. rented a shop and a post-office box in a certain town, falsely assuming the name, A. Swannick. There was a responsible merchant in that town named Arthur Swannick. X. ordered goods from the plaintiff, who shipped them, after having received from a mercantile agency a favorable report concerning the standing of Arthur Swannick. The carrier, after first offering the goods to this person, delivered them to X., who receipted for them in the assumed name and absconded. In an action against the carrier for an improper delivery, it was held that he had not been guilty of negligence, and was not liable.⁷ The plaintiff contended that his purpose was to send the goods to the real Swannick, but, said the Court, "it is equally true that he intended to send them to the person with whom he was in correspondence. We think the more correct statement is that he intended to send them to the man who ordered them and agreed to pay for them, supposing erroneously that he was Arthur Swannick. It

⁶ L. R. 3 App. Cas. 459, where the House of Lords affirmed the judgment of the Court of Appeal in 2 Q. B. D. 96, which reversed the decision of the Queen's Bench in 1 Q. B. D. 348.

⁷ *Samuel v. Chaney*, 135 Mass. 278. Cf. *Pacific Express Co. v. Shearer*, 160 Ill. 215.

seems to us that the defendant, in answer to the plaintiff's claim, may well say, we have delivered the goods entrusted to us, according to your directions, to the man to whom you sent them, and who, as we were induced to believe by your acts in dealing with him, was the man to whom you intended to send them; we are guilty of no fault or negligence."

It is well settled that if a man falsely represents that he is the agent of another and thus obtains possession of property, there is no sale and the transaction is void.⁹ In this instance the seller intends to contract, not with the person before him but with a principal, who is either non-existent or has not authorized the contract. There is, consequently, no meeting of minds between seller and buyer. The offer or declaration of will by the seller is not met by a corresponding will on the part of any buyer, and the offer to sell not being made to the party present cannot be accepted by him.

⁸ In the somewhat similar case of *Southern Express Co. v. Van Meter*, 17 Fla. 783, a different conclusion was reached, and the carrier was held bound to deliver to the person had in view by the shipper, although the goods had been shipped upon the faith of a telegram to which that person's name had been forged. But in *Western Union Tel. Co. v. Meyer*, 61 Ala. 158, the decision accords with *Samuel v. Chaney*. The liability of a carrier, however, for wrongful delivery depends upon other principles than those regulating the question whether a sale is void or voidable.

⁹ *Hardman v. Booth*, 1 H. & C. 803; *Hollins v. Fowler*, L. R. 7 H. L. 757; *Hentz v. Miller*, 94 N. Y. 64; *Hamet v. Letcher*, 37 Ohio, 356; *La Salle Brick Co. v. Coe*, 65 Ill. App. 619. If A. represents himself as agent for an undisclosed principal, and thus obtains goods from B., there being no such principal there is no sale, and B. may replevy the goods from the *bona fide* transferees of A. *Rodliffe v. Dallinger*, 141 Mass. 1. If A. falsely represents himself to be a member of a certain firm and obtains from B. possession of property by means of a forged check of the firm, the contract is void, and an innocent person subsequently selling the property is liable to B. *Alexander v. Swankhammer*, 105 Ind. 81; *Moody v. Blake*, 117 Mass. 23. If A. fraudulently represents to B. that he is C.'s brother, and B. sells to C. through A. as his agent, there is no contract and the property in the goods does not pass. *Barker v. Dinsmore*, 72 Pa. 427. But where there is no false representation of agency, and the seller gratuitously supposes that the person buying from him is acting as another's agent, the property in the goods passes. *Stoddart v. Ham*, 129 Mass. 383.

The rule in England seems to be that in order to constitute a mistake as to a person, a party must have in view some existing person whom he mistakes for the person with whom he deals. Then, if there be no such other existing person, the contract may be avoided for fraud and not mistake. Thus where a man assumed a fictitious firm name and obtained goods from one who supposed that he was contracting with the firm, the contract is voidable for fraud and not void for mistake, and consequently the seller cannot take the goods from a *bona fide* purchaser for value.¹⁰ So also in a case where a notorious money lender named Gordon assumed the name of Addison and loaned money to the defendant at fifty per cent. interest, it was held that, since the defendant would not have had any dealings with Gordon if he had known the fact, the contract was voidable for fraud.¹¹

§ 69. **Mistake as to the Existence of the Subject-Matter.**

This arises when at the time the contract is made the subject-matter of it has, unknown to the parties, ceased to exist, in which case the agreement is void. Thus, in the sale of a ship or cargo at sea which has been lost, or of a horse which is dead, the contract confers no rights upon either party.¹ So, an agreement for the sale of an estate by an assignee of a life tenant is void, if the life tenant is then dead, both parties being ignorant of the fact.²

There was a lease of land for a designated rent when both parties supposed that there was coal under it which could be mined. It was contemplated that the lessee would mine the coal, but the rent was not in the nature of a royalty. Upon ascertaining the fact that there was no coal under the land, it was held that the mistake of the parties as to this fact entitled the lessee to relief from the covenant to pay the rent.³

¹⁰ *King's Norton Metal Co. v. Edridge & Co.* (1897), 14 T. L. 98.

¹¹ *Gordon v. Street* [1899], 2 Q. B. 641.

¹ *Allen v. Hammond*, 11 Peters, 63; *Contarier v. Hastie*, 5 H. L. C. 673.

² *Cochran v. Willis*, L. R. 1 Ch. Ap. 58.

³ *Fritzler v. Robinson*, 70 Iowa, 500.

§ 70. **Mistake as to the Identity of the Subject-Matter—Error in Corpore.** This sometimes occurs when one party is thinking of one thing and the other party of another thing, and both have the same name or answer a common description.

Thus where there was an agreement to buy a lot on Prospect Street in Waltham, and it appeared that there were two streets of that name, defendant intending to buy a lot on one of said streets and plaintiff to sell a lot on the other, it was held that no contract had been made.¹ So, when the contract was for the sale of hemp, the buyer intending Riga hemp and the seller St. Petersburg hemp, because the common broker had given to them different sale notes, it was held that the mistake prevented the formation of a contract.² In a case where the contract was for the sale of a cargo to arrive "ex Peerless from Bombay," it was found afterwards that there were two ships of that name sailing from that port about the same time. It was held that, since the buyer was thinking of one and the seller of the other, the agreement was void.³

There may also be a mistake *in corpore*, when two different things have not the same name, but one of the parties to the contract makes an *excusable* mistake in thinking that the contract relates to one thing while the other party has a different object in view. When the thing, the *corpus*, had in view by one party is different from that contemplated by the other, the mistake is vital.

When at an auction sale of land, the auctioneer verbally corrected a misdescription in the particulars of sale or advertisement, a purchaser who did not hear the correction and bought, supposing that he was buying the property as advertised, is entitled to rescind the contract.⁴

¹ *Kyle v. Kavanagh*, 103 Mass. 356.

² *Thornton v. Kempster*, 5 Taunt. 786.

³ *Raffles v. Wichelhaus*, 2 H. & C. 906.

⁴ *In Re Hare & O'More's Contract* [1901], 1 Ch. 93. Cf. *Harris v. Pepperell*, L. R. 5 Eq. 1. It was held in *Sheldon v. Capron*, 3 R. I. 171, that when at an auction sale a man bids upon one lot of goods supposing it to be another, he is not bound. This decision seems to stray from the right path, since the mistake was not excusable. In *Malins v. Freeman*, 2 Keen, 25, where a similar mistake was made,

A parcel of ground improved by a front building and a back building connected together and used as one lot, was sold under a description by metes and bounds which did not include the back building. A purchaser who naturally supposed, according to the visible situation of the premises, that he was buying the back building and lot as well as the one included in the description, was relieved from the purchase upon the ground of a mistake as to the subject-matter.⁵ If you intend to sell me a certain thing or parcel of ground and I intend to buy another, the mistake as to identity, if excusable, renders void the sale.⁶ So, it has been held that one who views the wrong lot and contracts to buy may rescind the agreement.⁷

If the parties agree concerning a specified article, the mere fact that it is called by different names cannot on principle affect the validity of the contract.⁸

When the contract is to sell one thing and another similar thing is delivered by mistake, the contract is not performed, but such error does not affect its formation.

the Court refused specific performance against the purchaser, but left the seller an action for damages. See also, *Van Praugh v. Everidge* [1903], 1 Ch. 434.

⁵ *Biddison v. Aaron*, 102 Md. 156. To the same effect is *Crawley v. Jean*, 189 Mass. 220. See also, *Ellicott v. White*, 43 Md. 145; *Bigham v. Madison*, 103 Tenn. 358; 47 L. R. A. 267; *Denny v. Hancock*, L. R. 6 Ch. Ap. 13.

⁶ See *Hanson v. Globe Co.*, 159 Mass. 305; *Mead v. Phoenix Ins. Co.*, 158 Mass. 124; *Bridgewater Iron Co. v. Ins. Co.*, 134 Mass. 433; *Cutts v. Guild*, 57 N. Y. 229; *Strong v. Lane*, 66 Minn. 94. *Si igitur me fundum emere putarem Cornelianum, tu mihi te vendere Sempronianum putasti, quia in corpore dissensimus emptio nulla est Idem est, si ego me Stichum, tu Pamphilum absentem vendere putasti; nam cum in corpore dissentiatur, apparet nullam esse emptionem.* Dig. 18, 1, 9 (*de contrahenda emptione*).

⁷ *Goodrich v. Lathrop*, 94 Cal. 56; *Benson v. Markoe*, 37 Minn. 30. But see *McKinnon v. Vollmar*, 75 Wis. 82; 6 L. R. A. 121, where the mistake of the purchaser, not having been caused by the vendor, was held not to be excusable.

⁸ *Plane si in nomine dissentiamus, verum de corpore constet, nulla dubitatio est quin valeat emptio et venditio: nihil enim facit error nominis cum de corpore constat.* Dig. 18, 1, 9, 1.

Mistake as to identity of part of the subject-matter. When the contract relates to two or more objects, or to a principal object and an accessory, and there is a mistake as to the identity of the accessory object, or as to a part of the subject-matter which is subsidiary, such mistake does not invalidate the whole agreement. This case is mentioned in the *Pandects*. There was a contract for the sale of a farm in which the slave *Stichus* was included. Afterwards it was discovered that the seller owned more than one slave of that name, and it is made clear that he intended to sell a different slave from the one had in view by the purchaser. The sale of the farm is nevertheless valid.⁹

With this may be compared the case of *Boone v. Eyre*,¹⁰ where the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies together with the stock of negroes on it for £500 and an annuity of £160 for his life, covenanting that he had a good title to the plantation and was lawfully possessed of the negroes. The defendant covenanted to pay the annuity. In an action for its non-payment, the defendant pleaded that at the time of the making of the deed the plaintiff was not lawfully possessed of the negroes on the plantation and had not a good title to convey. Lord Mansfield said: "The distinction is very clear,—when mutual covenants go to the whole of the consideration on both sides they are mutual conditions, the one precedent to the other. But when they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. *If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.*"

A mistake, therefore, as to the identity of a subordinate part of the contract does not invalidate the whole, any more

⁹ Dig. 18, 1, 34 pr. This was the opinion of Paulus. To it Labeo added the gloss that the seller had the right to select which of the two slaves should be included. But in our law it would seem that the mistake as to the identity of the slave would render that part of the contract void and entitle the purchaser to compensation for the deficiency if the sale of the farm and slave was for a lump sum.

¹⁰ 1 H. Black. 273, note; 18 English Ruling Cases, 609.

than the failure of one party to perform a subsidiary stipulation operates to discharge the other party from all liability.¹¹

§ 71. **Mistake as to the Nature or Qualities of the Subject-Matter—Error in Substantia.** When a specific and identified article is sold, a mistake as to its qualities by the buyer alone leaves him without remedy unless there has been an express warranty or fraud, and a mistake on this point by the seller alone affords no title to relieve ¹by him or against him. But when both parties are mistaken as to certain fundamental qualities or attributes of the subject-matter of the contract, and the absence of these qualities makes it a thing different essentially from that with which the parties suppose they are dealing, and when the contract would not have been made but for the assumption that the thing possessed those qualities, then such a mistake, being as to the substance, avoids the contract. The following cases illustrate this kind of mistake:

Plaintiff agreed to sell to the defendant for £460 a policy of insurance for £500 on the life of a third person, whom they both thought to be then living. This person was in fact at the time dead, and the amount which thus became due on the policy was £777. It was held that, although the policy had been assigned to the purchaser, the plaintiff was entitled to have the contract and the assignment set aside on the ground of mistake.¹ A policy of insurance on an existing life is essentially a different thing from a policy which has matured and become a claim against the insurer. The Court said: "Both parties entered into this contract upon the basis of a common affirmative belief that the assured was alive; but as it turns out that this was a common mistake, the contract was one which cannot be enforced. This is so at law; and the plaintiffs do not require to have recourse to equity to rescind the contract, if the basis which both parties recog-

¹¹ See *post*, Part vi, ch. 3, as to breach of subsidiary agreement.

¹ *Scott v. Coulson* [1903], 2 Ch. 249, affirming *S. C.* [1903], 1 Ch. 453. The same principle was applied in the somewhat similar case of *Riegel v. Am. Ins. Co.*, 153 Pa. 134.

nized as the basis is not true. * * * The material date all through is the date of the contract. If at that date a good contract was entered into, I cannot conceive that it could be rescinded. But it turns out that it was a contract entered into under a common mistake existing at the date of it, and therefore it follows that an assignment executed in pursuance of such a contract cannot be supported."

In *Sherwood v. Walker*,² the owner of a blooded cow, supposed by both parties to be barren, agreed to sell her for \$80. If the cow would breed, she would have been worth \$1,000. After the contract was made the cow was discovered to be with calf, and the seller rescinded the contract. It was held that he had a right to do so, the Court saying: "The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going as it were to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration. * * * It seems to me, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. The parties would not have made the contract of sale except upon the understanding and belief that the cow was incapable of breeding. * * * A barren cow is substantially a different creature from a breeding one."³

If one gives another a coin which he supposes, and the other party supposes, to be a half dollar, but which is really a gold coin of the value of ten dollars, he is entitled to recover it back⁴ It was said in this case that the mistake was as to the identity of the thing; but the parties certainly had in view the same tangible object, and the mistake was as to the

² 66 Michigan, 568.

³ "If one buys vinegar believing it to be wine, the contract is void, but otherwise if the wine is merely sour; and similarly if one buys a female slave believing her to be a male, or *vice versa*; though the contract is good if she was believed to be *virgo*, but is actually *mulier*." Moyle on Contract of Sale in the Civil Law, citing Dig. 18, 1, 11, 1.

⁴ *Chapman v. Cole*, 12 Gray, 141.

qualities of the thing—*error in substantia*. So, a contract for the sale of land when both parties supposed a harbor existed at that point may be avoided upon the discovery that there is no harbor on the land.⁵

In another case the facts were that plaintiff owned a house and lot worth \$1,700 situated in a town in Ohio. Defendant owned 80 acres of land in Iowa, supposed to be good, dry, tillable land, worth at least \$10 an acre, but in fact marshy and unfit for cultivation, and not worth more than \$3 per acre. Defendant proposed an exchange, and as neither had ever seen the land, both parties called on one Pugh for information. Pugh said that he was acquainted with the land; that it was of good quality and worth at least \$10 per acre. Deeds of exchange were executed, defendant giving notes for \$700 to make up the supposed difference in value. A few months afterwards plaintiff, having discovered the mistake as to the quality of the Iowa land, petitioned for a rescission, and it was held that there had been a mutual mistake as to a material part of the subject-matter, for which reason the deeds should be vacated.⁶

There is no mistake in the legal sense as to the qualities of the subject-matter unless both parties affirmatively attribute to it characteristics it does not possess. If they are simply ignorant of its real nature the contract stands. Thus a woman who had found an uncut diamond sold it to the defendant for one dollar. Neither party knew at the time what the stone was, or what its value was. When it was subsequently discovered to be worth upwards of \$700 she endeavored to rescind the sale, but it was rightly held that she had

⁵ *Miles v. Stevens*, 3 Pa. St. 21.

⁶ *Irwin v. Wilson*, 45 Ohio St. 426. It was held in *Hoopes v. Fitzgerald*, 204 Ill. 330, that a mistake as to the sufficiency of the walls of a building to support a superstructure, when that was an essential quality contemplated by the parties, is ground for rescinding a contract of sale. In *Rayner v. Wilson*, 43 Md. 440, it was held that when the agreement is for the sale of a ground rent on a certain property, the purchaser is not bound to accept a rent reserved by a sub-lease, there being an essential difference between a rent reserved by an original lease and one reserved by a sub-lease.

no title to relief⁷ In the absence of fraud or warranty or a mutual mistake as to fundamental qualities, the value of a thing sold, as compared with the price paid, is no ground for rescission.⁸

⁷ Wood v. Boynton, 64 Wis. 265.

⁸ Wheat v. Cross, 31 Md. 99. In Roman law *error in substantia* meant a mistake as to the physical nature or material of the subject-matter, as, for instance, the purchase of an article of bronze, supposed to be gold, or of lead or copper, gilded for silver, or of vinegar for wine, or of a female slave for a male. See Dig. 18, 1, L. 9, § 2; L. 11; L. 14; L. 41, § 1. Pothier (oblig. 18) laid down the rule that a mistake avoided the contract, not only when it related to the thing itself but also when it related to that quality of the thing which the contracting parties chiefly had in view, and which constituted the substance of the thing. That is why, he says, the contract is void for mistake, if, wishing to buy a pair of silver candlesticks, I buy from you a pair of candlesticks which you offer, which I take to be silver, but which are really only copper covered with silver gilt, although you had no intention to deceive me and made the same mistake as I did. The authors of the Code Napoleon, following Pothier in this respect, as they did in most others concerning the law of obligations, provided as follows in article 1110: "Mistake is not a ground for avoiding a contract unless it relates to the substance itself of the thing which is the object of the agreement."

There has been great diversity of opinion as to the meaning of the word *substance*, which is an obscure, equivocal, enigmatical expression. The opinion of the earlier commentators restricted the word to qualities essential *ex natura rei*, for instance, copper gilded instead of gold. Another school enlarged the juridical conception of substance to essential qualities *ex parte*. This included the origin or form, provided it appears that this quality induced the parties to contract. Some require an express agreement in order that such qualities should be treated as being of the substance. But most others hold that an implied understanding is sufficient, provided that the quality is one which makes a difference in kind, as, for instance, a draught horse instead of a race horse. Other writers consider more wisely that there is no invariable and absolute standard, but that all depends upon the facts of the particular case. It must be shown that the party would not have contracted unless there had been a mistake as to the substantial quality chiefly had in view. For instance, a collector of antiques buys a gold ring found in Pompeii. Here gold is not of the substance, but the place of origin is. See Giorgi (*op. cit.*) iv. 50, *et seq.* Huc says (Com. vii, p. 38), that the fact that the parties have used a special description such as silver or golden candlestick, shows that they have agreed that such quality shall be a condition of the validity of the contract. Therefore, if there be a mistake as to this quality the contract is voidable, not for

§ 72. **Mistake as to the Quantity of the Subject-Matter.** If one party intends to sell a certain quantity of an article, and the other party intends to buy a different quantity, the contract is void, because in such case the parties are not *ad idem*. They have seemed to make a contract, but the essential element of certainty is lacking. The cases previously referred to where a telegram making an offer is altered in the course of transmission and the offeree accepts it as altered illustrate this principle¹ In *Henkel v. Pape*,² the parties had been in negotiation for the purchase of fifty rifles, but no agreement had been reached when defendant telegraphed, "Send me *three* rifles." The telegram as delivered read "*the* rifles," and plaintiff shipped fifty rifles. It was held that defendant was not bound by the altered telegram.

Where the contract is for the sale of a certain quantity, and the seller delivers by mistake a larger quantity, the buyer is entitled to reject the delivery and cannot be compelled to select the quantity agreed upon from the larger mass.³ This particular kind of mistake, however, affects the performance and not the formation of the contract.

In the case of an agreement for the sale of a tract of land supposed to contain a certain number of acres, and the number of acres is found afterwards to be either more or less, it depends upon the amount of the excess or deficiency and the construction of the contract, whether the agreement will be rescinded or a proportionate change in the price allowed.⁴

mistake as to the substance but for mistake as to a quality by virtue of the agreement which made that quality a term of the contract. This view, however, does not solve such cases as *Scott v. Coulson* and *Sherwood v. Walker*, previously cited in this section. The French Courts hold that when a picture attributed to a certain painter is sold, a mistake in the attribution is not a ground for avoiding the contract, unless its authenticity was expressly made a part of the agreement. *Huc. Com.*, p. 40.

¹ *Ante*, § 24.

² L. R. 6 Exch. 7.

³ *Salmon v. Boykin*, 66 Md. 541.

⁴ *Paine v. Upton*, 87 N. Y. 327; *Balto. Permanent, etc., Socy. v. Smith*, 54 Md. 187; *Mendenhall v. Steckel*, 47 Md. 453; *Carmody v. Brooks*, 40 Md. 240; *Jones v. Plater*, 2 Gill, 125, note. In *Newton v. Tolles*, 65 N. H. 136; 9 L. R. A. 50, a contract for the sale of a farm

If one buys a certain quantity of metal as ascertained by an assay, and it turns out afterwards that there was a mistake as to quantity in the assay, the buyer may rescind and recover what he paid or he may recover for the deficiency.⁵

Plaintiff bought from defendant 3,000 quarters of corn for shipment to Liverpool, receiving a bill of lading for that quantity. Owing to a mistake in weighing at an elevator, the quantity actually delivered was upwards of 200,000 pounds short in weight. Plaintiff resold the corn to A., who sold it again to B., both sales being made upon the faith of the bill of lading. When the corn arrived at Liverpool and the deficiency in quantity was discovered, A. refunded to B. the amount called for by the shortage, and demanded from plaintiff the same amount. In an action against the defendant it was held that the plaintiff was entitled to recover the amount claimed for the deficiency, although he had not actually paid the sum to his vendee.⁶

§ 73. **Mistake as to the Price.** This may occur when the seller *bona fide* thinks that he is selling at one price and the buyer thinks that he is buying at another. There is then no contract, because no complete meeting of minds. But there is no mistake of this kind when the contract does not fix the price at all, for the law in that case implies a reasonable price.

Where plaintiff supposed he was selling a horse for \$165 and defendant was equally honest in the belief that he was buying for \$65, and took the horse away, it was held that plaintiff was entitled to maintain replevin, because there had

supposed by both parties to contain 200 acres, when in fact it contained only 135 acres, was rescinded. See also as to mistake as to quantity generally, *Bickham v. Gough*, 4 H. & McH. 17; *Chute v. Quincy*, 156 Mass. 189.

⁵ *Cox v. Prentice*, 3 M. & S. 344. See also, *Coon v. Smith*, 29 N. Y. 393.

⁶ *Denton v. Gill & Fisher*, 102 Md. 386. In *Wheadon v. Olds*, 20 Wendell, 174, the parties erroneously supposed that a certain quantity of grain had been delivered and paid for. When it was afterwards ascertained that the quantity was less, the buyer was allowed to recover for the deficiency.

been no sale.¹ If the seller names a price by mistake which is accepted with knowledge that there is a mistake, the contract may be avoided, but not if the buyer is unaware of the mistake, for then the seller is bound by what he leads the other party to believe.²

A mistake by one party alone in adding up a column of figures in consequence of which he makes a certain bid which is accepted is no ground for rescission.³ But it is otherwise if both parties are mistaken in a computation as to the amount of work to be done, upon the faith of which the price is fixed.⁴

§ 74. **Mistake as to Ownership.** A contract to purchase a thing which is really the property of the buyer is void, although the parties may be ignorant of the fact.¹ The voidability of such an agreement may also be put upon the ground that there is no consideration, and upon the ground that it is impossible for the seller to transfer ownership.

It is commonly said that ignorance or mistake of law, as opposed to a mistake of fact, is no ground for relief, because everybody is presumed to know the law.² But in a case where a contract by a man to purchase his own property was held to be void, Lord Westbury said: "Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake or misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as hav-

¹ *Rupley v. Daggett*, 74 Ill. 351. See also concerning mistake as to price, *Rovegno v. Defferari*, 40 Cal. 459; *Hume v. U. S.*, 132 U. S. 406.

² *Harran v. Foley*, 62 Wis. 584; *Webster v. Cecil*, 30 Beav. 62; *Paget v. Marshall*, 28 Ch. D. 255.

³ *Steinmeyer v. Schroepel*, 226 Ill. 9; 10 L. R. A. (N. S.) 117. See also *Brown v. Levy*, 29 Tex. Cir. Ap. 389.

⁴ *Dunn v. O'Mara*, 70 Ill. Ap. 607. Cf. *Long v. Athol*, 196 Mass. 497; 17 L. R. A. (N. S.) 96; *Moffatt Co. v. Rochester*, 178 U. S. 378.

¹ 2 Blackstone, Com. 450; *Bingham v. Bingham*, 1 Ves. Sr. 126. *Suae rei emptio non valet, sine sciens sine ignorans emit.* Dig. 18, 1, 16.

² *Baltimore City v. Lefferman*, 4 Gill, 425, and cases cited in note.

ing proceeded upon a common mistake.”³ So, if one thinking that he has only a leasehold interest in certain land buys the supposed reversion, he may recover the money as paid under a mistake of fact upon discovering that he was really the owner in fee.⁴ Conversely, it has been held that if a man sells property in his possession, which he supposes to belong to A. and as A.’s agent, and it afterwards turns out, contrary to the expectation of all parties, that it was the seller’s own property, there is no sale.⁵

An administrator sold land supposing that he was selling the fee and the purchaser supposed that he was buying that interest. When it turned out that nothing passed but an equity of redemption, it was held that this was a material and mixed mistake of fact and law which entitled the purchaser to relief.⁶ A deed executed in consequence of a common mistake as to the extent of the grantor’s interest in the land will be vacated.⁷ A mistake “as to the ownership of land is a mistake of fact in regard to which equity will grant relief, although the mistake arose from an erroneous view of the legal effect of a deed.”⁸

When a party consents to the distribution of money to another under the erroneous belief that the latter is entitled to it, that consent does not afterwards estop him from requiring that the mistake be corrected.⁹

³ *Cooper v. Phibbs*, L. R. 2 H. L. 170. See also concerning mistake as to title, *Wilson v. Md. Life Ins. Co.*, 60 Md. 157; *Ankenny v. Clark*, 148 U. S. 345; *Bigham v. Madison*, 103 Tenn. 358; *Hatch v. Kizer*, 140 Ill. 583.

⁴ *Martin v. McCormick*, S N. Y. 431. See also, *Haven v. Foster*, 9 Pick. 112.

⁵ *Cutts v. Guild*, 57 N. Y. 234.

⁶ *Griffith v. Townley*, 69 Mo. 13.

⁷ *Burton v. Haden*, 108 Va. 51; 15 L. R. A. (N. S.) 1039.

⁸ *Livingston v. Murphy*, 187 Mass. 315. In this case a husband and wife agreed to secure their joint note by a mortgage covering all their interest in a tract of land. All the parties supposed that the land belonged to the wife, while in fact it belonged to the husband. He united in the mortgage only to release his curtesy. It was held that the mortgagee could compel the execution of a new mortgage.

⁹ *Patterson v. Buchanan*, 92 Md. 334; *Prince de Bearn v. Winans*, 111 Md. 434.

§ 75. **Mistake as to Essential Facts.** Sometimes a mistake by one or both of the parties as to the existence of a fact which they assume to be true as an inducement to their agreement may render the contract void or voidable. This effect may also be produced by another cause apart from the mistake. Thus an agreement to do that which is impossible or unlawful may be void for illegality or impossibility, or it may be voidable for fraud or mistake.

Defendant, a credit insurance company in New Jersey, employed plaintiff to act as its agent in Massachusetts, where that kind of business is prohibited by statute. Plaintiff was discharged before the end of his term of employment and sued for damages. It was held that if both parties were ignorant of the Massachusetts statute, this common mistake, which was of fact, since it related to the law of another State, rendered the contract void, but that if the defendant alone knew it, the concealment was fraudulent.¹

Many of the instances in which an action lies to recover money paid to the defendant under a mistake of fact are cases in which the money was paid under an agreement void for mistake as to a material fact.²

A. contracted to erect for B. a flour mill capable of an output better in kind and quantity, to a designated extent, than that produced by the X. mill. The parties thought that the X. mill made a certain grade of flour, when in fact it did not. It was held that since the parties contracted under a mutual mistake and upon the assumption that something existed which did not, the contract is void.³

When a party is led to make a contract for the construction of a sewer at a certain price under a mutual mistake as to the amount of work to be done, caused by the erroneous

¹ *Rosenbaum v. U. S. Credit System Co.*, 64 N. J. L. 34.

² *Baltimore City v. Lefferman*, 4 Gill, 425, note. As a general rule, money paid or property voluntarily transferred to a claimant under a *mistake of law* common to both parties cannot be recovered back. *Baker v. Baker*, 94 Md. 627.

³ *Nordyke, etc., Co. v. Kehler*, 155 Mo. 643.

estimate of an engineer, he is entitled to rescission on the ground of mistake.⁴

If a policy of marine insurance is cancelled because both parties erroneously assume that the vessel had arrived in port, the agreement to rescind may be vacated.⁵

⁴ *Long v. Athol*, 196 Mass. 497; 17 L. R. A. (N. S.) 96.

⁵ *Duncan v. N. Y. Ins. Co.*, 138 N. Y. 88.

CHAPTER VII

MISREPRESENTATION AND FRAUD

§ 76. **Misrepresentation Distinguished from Fraud.** An untrue statement respecting a material matter made by one party to a contract which influences the conduct of the other party, may or may not be believed to be true by the party making it. If such statement is known by the party making it to be false, or is not actually believed by him to be true, his statement amounts to fraud. The effect of fraud will be treated separately. We will first consider simple misrepresentations; that is, the affirmation of material facts, not actually true but believed to be true by the party making them, whether such party had reasonable ground for his belief or not.

A misrepresentation in this sense is to be distinguished from a condition or warranty. The party to whom a statement concerning the subject-matter of a contract is made may refuse to rely upon the mere word of the other party and demand that the statement be made a component part of the contract. If this is assented to, the statement becomes a condition or warranty or a term in the agreement, and in that case it is entirely immaterial whether the party knew the statement to be false or not. What would otherwise have been a misrepresentation, then becomes a promise, and the question is whether it is broken or performed, not whether the statement was true or false at the time it was made. It is often difficult to determine whether a statement is a term of the contract or not. The question is one of construction.

In a few cases an innocent misrepresentation has been treated as causing such a mistake as to the subject-matter of the contract as to render it void, because both parties believed such subject-matter to be something other than it really was.¹

¹ See *Kennedy v. Panama, etc., Co.*, L. R. 2 Q. B. 588; *Brooks v. Martin*, 15 Minn. 33.

But, generally, innocent misrepresentations do not "strike at the root of the contract," but only concern some quality or incident, the absence or presence of which is not sufficiently important to constitute an *error in substantia* in the sense explained in the preceding chapter. The misrepresentations, therefore, with which we are concerned are not to be regarded from the point of view of common mistake.

Misrepresentations are also to be distinguished from cases where a thing is sold by a particular description and the thing delivered is different. There is then neither a mistake nor a misrepresentation, but the contract is not performed.²

A misrepresentation concerning a material point, not amounting to fraud, and not a term of the contract, and not creating an *error in substantia*, is differently treated at law and in equity, and is differently treated at law when a certain class of contracts are involved.

§ 77. **Rule in Equity as to Misrepresentations.** The doctrine of Courts of equity is that a material untrue statement, though not made fraudulently, and though not a term of the contract, is ground for granting relief to the party

² This is very well shown by *Bannerman v. White*, 10 C. B. N. S. 844; 31 L. J. C. P. 28, where the seller of the hops grown on 300 acres of land was asked by the buyer if any sulphur had been used in their treatment. The reply was in the negative. The buyer said that if sulphur had been used he would not even ask the price. Then a sale was agreed upon, no further reference being made to sulphur. Afterwards it was discovered that sulphur had been used on five out of the 300 acres in experimenting with a new machine, and that the seller had either forgotten this or thought it of no moment. The buyer then repudiated the contract. In an action against him for the breach the jury found as matters of fact that the statement that no sulphur had been used was not wilfully false, but that "the affirmation that no sulphur had been used was intended between the parties to be part of the contract of sale." The Court in giving judgment on this verdict for the defendant said: "The intention of the parties governs in the making and construction of all contracts. If the parties so intend the sale may be absolute, with a warranty superadded, or the sale may be conditional, to be null if the warranty is broken. And upon this statement of facts we think that the intention appears that the contract should be null if sulphur had been used."

who entered into the contract because he relied upon such misstatement.¹ In fraud, there is always present an element of moral wrong or delinquency; in misrepresentation such element is lacking. But mere commendation is not actual misrepresentation. *Simplex commendatio non obligat*.

This subject has been much confused by the use of the term "constructive fraud," or "legal fraud," as equivalent to a material but innocent misrepresentation. So it has been said that if a party does not know the representation to be false, or makes a mistake, his negligence is equivalent to fraud.² Equity proceeded on the theory that a man who obtained the benefit of a contract by a untrue statement was "bound to make his representation good," and that the innocent misrepresentation of a fact was as injurious to the other party as one wilfully false. Making a representation good, in this sense, is a different thing from performing a promise.

Equity considers that the party to whom a representation of fact is made has a right to rely upon it, and is relieved from the necessity of making an investigation. It is not a sufficient answer to him to say, "If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them."³

¹ *Smith v. Richards*, 13 Peters, 36; *Joice v. Taylor*, 6 G. & J. 54; *Tayman v. Mitchell*, 1 Md. Ch. 497; *Kent v. Carcaud*, 17 Md. 299; *Keating v. Price*, 58 Md. 532; *Crowley v. Smith*, 46 N. J. L. 380; *Rorer Iron Co. v. Trout*, 83 Va. 397. Cf. 2 Pomeroy, Eq. Jur. §§ 884, 887.

² *Smith v. Richards*, 13 Peters, 36, 38.

³ *Redgrave v. Hurd*, 20 Ch. D. 1, 12. In this case the Master of the Rolls said that the text-books did not accurately state the law. In *Slaughter v. Gerson*, 13 Wallace, 385, it is said by Field, J.: "When the means of information are at hand and equally open to both parties, and no concealment is made or attempted, then the misrepresentation furnishes no ground for a Court of Equity to refuse to enforce the contract of the parties. The neglect of the purchaser to avail himself in all such cases of the means of information, whether attributable to his indolence or credulity, takes from him all just claim to relief." But in *Clark v. Edgar*, 84 Mo. 106, and other cases, the law is laid down in accordance with the statement in the text.

In England the Judicature Act of 1873 effected a fusion of law and equity, and it was provided that whenever the rules of the two conflicted, the equitable rule should prevail. Since that statute, a party who has been induced to make a contract by the innocent misrepresentation of the other party has a right to ask for a rescission as well as to resist specific performance. Thus, where a party was induced by misrepresentations made without fraud by the defendant to become a partner in a business, it was held that he was entitled to a rescission of the contract and the repayment of his capital, although the business as restored to the defendant was worse than worseless.⁴ So, if one subscribes for shares in a company upon the faith of a prospectus stating that A. and X. will be directors, he is entitled to have his subscription vacated and the amount paid upon it refunded, if A. and X. had not promised to become directors, although the parties issuing the prospectus thought that they had, for, in an action for the rescission of a contract on the ground of misrepresentation, it is not necessary to prove knowledge by the defendant of its untruth.⁵

§ 78. Rescission of Contract in Equity for Misrepresentation.

The rule in England on this subject, as appears from the foregoing authorities, is that when one has been induced to make a contract by reason of material but not fraudulent misrepresentations of fact, he may ask for the rescission of the contract and the restoration of what he paid and delivered under it, upon his returning the consideration received. This rule is not restricted to contracts which are enforceable only in equity, but applies to all contracts, executed as well as executory. This right to disaffirm is as extensive as in the case of fraud.

In this country, a Court of Equity has always refused its aid in the enforcement of a contract obtained by misrepresentation, however innocent, on the theory that a man could

⁴ *Adam v. Newbigging*, 13 App. Cas. 308; *Newbigging v. Adam*, 34 Ch. D. 582.

⁵ *Karbery's Case* [1892]. 3 Ch. 1, 13

not be allowed to take advantage of his own untrue statement after he finds out that it was untrue. But when the contract is enforceable by action at law, or has been executed on both sides, the *general rule* is that a party cannot resort to a Court of Equity to have it rescinded on the ground of misrepresentation not fraudulent.¹ In exceptional cases, however, equity does rescind a contract for such misrepresentation, when the circumstances appeal to the conscience of the Chancellor.²

§ 79. **Rule at Law.** The principle applied in courts of law is that a material misrepresentation, not amounting to fraud and not a term of the contract, has no effect whatever, except in the case of a certain class of contracts. This rule is based upon the theory expressed in the maxims, *caveat emptor*, *simplex commendatio non obligat*, and in the frequent statement that the parties contract with one another at arm's length. A party in contracting is deemed not to have a right to rely upon a statement made to him in good faith by the other party unless such statement amounts to a promise or condition or warranty. In the sale of chattels, statements by the seller upon which the buyer relies are often treated as warranties.

There are, however, certain contracts which are treated as being *uberrimae fidei*, and in these an innocent misrepre-

¹ *Wenstrom Co. v. Purnell*, 75 Md. 120; *Groff v. Rohrer*, 35 Md. 327; *Dillon v. Conn. Ins. Co.*, 44 Md. 386; *McShane v. Hazlehurst*, 50 Md. 107; *Wilde v. Gibson*, 1 H. L. C. 632; *Brownlie v. Campbell*, L. R. 5 App. Cas. 936. See, 1 Story's Eq. Jur. §§ 193-197. In *Cochran v. Pascault*, 54 Md. 1, the Court refused to rescind an executed contract on the ground of misrepresentation, although specific performance of the contract would not have been granted. See, *Delaihe Co. v. James*, 94 U. S. 207.

² *Tucker v. Osbourn*, 101 Md. 613; *Wilson v. Md. Life Ins. Co.*, 60 Md. 157; *Taymon v. Mitchell*, 1 Md. Ch. 497; *Kountze v. Kennedy*, 147 N. Y. 124; *Trimble v. Reid*, 97 Ky. 713.

As to when equity will rescind a contract for innocent misrepresentations, see also, *Hicks v. Setvens*, 121 Ill. 186; *Grosh v. Ivanhoe Co.*, 95 Va. 161; *Robinson v. Welty*, 40 Va. 402. Cf. *Holcomb v. Noble*, 69 Mich. 396, as to action at law. It seems likely that this exception will eventually kill the rule.

sentation is a ground for rescission. Parties in making these contracts are regarded as standing in a quasi-fiduciary relation to one another, and are under the obligation to state the material facts accurately, if they state them at all, whether they know them accurately or not.

§ 80. **Contracts Uberrimae Fidei, or of the Utmost Good Faith.**

The principal contracts affected at law as well as in equity by innocent misrepresentation are the following:

(1) *Contracts of life insurance.* The accidental misrepresentation or concealment of a material fact by the assured is ground for avoiding the contract.¹

(2) *Contracts of marine insurance.* The applicant is bound to communicate to the insurer with accuracy all the material facts within his knowledge, and negligence is visited with the same penalty as a wilful purpose to defraud.²

(3) *Contracts of fire insurance.* In this case there is not the same duty to make full disclosure of all facts as in the case of marine insurance, but the innocent misrepresentation of a material fact is ground for avoiding the policy. Statements by the assured respecting the property insured, or his title to it, are called warranties, and the force of the policy depends upon their truth.³

(4) *Contracts for the sale of land.* A party contracting to buy or sell land is not bound to make a full disclosure. Thus, in buying land on which there is a valuable mine, the purchaser is under no obligation at law or in equity to disclose that fact to the seller.⁴ But a contract of this kind is

¹ *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Vose v. Eagle*, etc., Co., 6 Cush. 42; *London Assurance Co. v. Manuel*, 11 Ch. D. 363.

This rule is in some States modified by statute. See *Aetna Life Ins. Co. v. Millar*, 113 Md. 686.

² *Allegre v. Md. Ins. Co.*, 2 G. & J. 136; 8 G. & J. 190; *Neptune Ins. Co. v. Robinson*, 11 G. & J. 256; *Augusta Ins. Co. v. Abbott*, 12 Md. 348; *Ionides v. Pender*, L. R. 9 Q. B. 537.

³ *Wineland v. Security Ins. Co.*, 53 Md. 276; *U. S. Fire, &c., Co. v. Kimberly*, 34 Md. 224.

⁴ *Butler's Appeal*, 26 Pa. St. 63; *Fox v. Mackreth*, 2 Bro. C. C. 120; *Standard Steel Car Co. v. Stamm*, 207 Pa. 425.

uberrimae fidei in the sense that a misdescription by the vendor "materially affecting the value, title or character of the property sold, will make the contract voidable at the purchaser's option."⁵

(5) *Contracts between persons in fiduciary relations.* In this case the parties do not deal at arm's length, but a special confidence is reposed. Thus, contracts between guardian and ward, trustees and *cestui que trust*, attorney and client, etc., will be vacated upon grounds which would be insufficient if no such relation existed.⁶

This doctrine is applied to partners in their dealings with one another,⁷ and to "promoters" of corporations who make contracts with the corporation when organized, or with subscribers to the stock. Promoters are bound to act with the most entire good faith in selling property to, and making contracts with the corporation, and their dealings are set aside for misrepresentation or concealment.⁸ If they have made a contract for the benefit of the corporation to be formed, they cannot themselves retain the profits,⁹ or the

⁵ *Mitchell v. McDougal*, 62 Ill. 408; *Webster v. Bailey*, 31 Mich. 36; *Molyneux v. Hawtrey* [1903], 2 K. B. 487; *Foley v. Crow*, 37 Md. 60; *Keating v. Price*, 58 Md. 586; *Gunby v. Slater*, 44 Md. 237; *Rayner v. Wilson*, 43 Md. 444 (where the leading case of *Flight v. Booth*, 1 Bing. N. C. 370, was approved). In *Shea v. Evans*, 109 Md. 229, specific performance of a contract was refused because the vendor did not inform the purchaser that certain restrictions existed relating to the kind of buildings that could be erected on the land. See also to the effect that an innocent misrepresentation of a material fact is ground for the rescission of a contract for the sale of land: *McKinnon v. Vollmar*, 75 Wis. 82; *Rimer v. Dugan*, 39 Miss. 477; *Munroe v. Pritchett*, 16 Ala. 785; *Tyson v. Passmore*, 2 Pa. St. 122. In some States contracts relating to land are not treated as being *uberrimae fidei*.

⁶ *Williams v. Marshall*, 4 G. & J. 376, *note*; *Smith v. Davis*, 49 Md. 470; *McConkey v. Cockey*, 69 Md. 286; *Dougan v. Macpherson* [1902], App. Cas. 197; *Tate v. Williamson*, L. R. 2 Ch. 55.

⁷ Story on Partnership, § 172.

⁸ *Simons v. Vulcan Oil Co.*, 61 Pa. 202; *Densmore Oil Co. v. Densmore*, 62 Pa. 42; *Hooper v. Central Trust Co.*, 81 Md. 559; *Hambleton v. Rhind*, 84 Md. 456; *In Re Olympia* [1898], 2 Ch. 153; *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218.

⁹ *Pittsburgh, etc., Co. v. Spooner*, 74 Wis. 307.

profits arising from a secret contract with the owners of property to be acquired by the corporation.¹⁰

(6) *Composition with creditors.* If such composition has been brought about by means of the misrepresentation of facts by the debtor, whether believed by him to be true or not, it will be vacated.¹¹

(7) *Contracts of suretyship.* The duty of the creditor to disclose facts within his knowledge arises when such facts are material and could not well be ascertained by the guarantor.¹² So a concealment of previous defalcations by a person whose honesty is guaranteed vitiates the contract.¹³

FRAUD.

§ 81. **What Constitutes Fraud.** A contract obtained by means of fraud is voidable at the option of the defrauded party. What is a fraud depends upon the facts of each case. The rule of perfect morality which prohibits all cunning and craft, or astuteness practised by any one for his exclusive benefit, is not enforced by any code of human law. "And it thence follows," said the Court in *McAleer v. Horsey*,¹ "that a certain amount of selfish cunning passes unrecognized by courts of justice, and that a man may procure to himself in his dealings with others, some advantages to which he has no moral right, but to which he may succeed in establishing a perfect legal title. But if any one carries this too far; if by craft and selfish contrivance he inflicts an injury upon his neighbor, and acquires a benefit to himself beyond a certain point, the law steps in, annuls all that he has done, or rectifies the wrong by sustaining an action for deceit. The practical question then is, where is this point? and to this no specific answer is offered. The common law not only gives

¹⁰ *Emery v. Parrott*, 107 Mass. 95.

¹¹ *Jackson v. Hodges*, 24 Md. 468; *Graham v. Meyer*, 99 N. Y. 611.

¹² *Am. Surety Co. v. Pauly*, 170 U. S. 133; *Guarantee Co. v. Mechanics' Sav. Bank*, 183 U. S. 402; *Lake v. Thomas*, 84 Md. 608; *Lee v. Jones*, 17 C. B. N. S. 482; 34 L. J. Ex. 131.

¹³ *Railton v. Mathews*, 10 Cl. & F. 934; *Roper v. Trustees*, 91 Ill. 318; *Howe Machine Co. v. Farrington*, 82 N. Y. 121.

¹ 35 Md. 451.

no definition of fraud, but, perhaps wisely, asserts as a principle that there shall be no definition of it; for, as it is the very nature and assence of fraud to elude all laws in fact, without appearing to break them in form, a technical definition of fraud, making everything come within the scope of its words before the law could deal with it as such, would be in effect telling to the crafty precisely how to avoid the grasp of the law. Whenever, therefore, any Court has before it a case in which one has injured another, directly or indirectly, by falsehood or artifice, it is for the Court to determine in that case whether what was done amounts to cognizable fraud."

Sir W. Anson gives the following definition of fraud which he justly says is fairly precise: "Fraud is a false representation of fact, made with a knowledge of its falsehood or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it."

It may be taken that a charge of fraud against a defendant is established when it is shown:

(1) That the defendant made a material false representation, or concealed a fact which it was his duty to disclose.

(2) That such representation was known by the party making it to be false, or was made by him recklessly, *i. e.*, careless whether it was true or not.

(3) That such representation related to a fact and was not a mere matter of opinion.

(4) That the representation was made to the plaintiff, or was intended to affect him.

(5) That the other party relied on the representation, and thereby suffered loss.

§ 82. **Materiality of Statement.** The false representation must be material, and it is material if the contract would not

have been made if the fraud had not been practiced.¹ "It may be considered as an inference of law that if the representation was one calculated to induce the other party to make the contract, then he was influenced by it; and in order to take away his right to relief on this ground, it must be shown, either that he had knowledge of facts contrary to the representation, or that he showed by his conduct that he did not rely upon it."²

§ 83. **Knowledge of Falsity.** The knowledge by the party making it of the falsity of his statement distinguishes fraud from a misrepresentation.¹ Fraud, therefore, is a moral wrong as well as a legal one, and gives rise to an action *ex delicto* as well as to one *ex contractu*.

The question as to what is sufficient to establish fraudulent intent "is presented," said the Court in *Cowley v. Smyth*,² "in a complex form when the defendant has added to a representation—which turns out to be untrue, but was not false to his knowledge,—an affirmation that he made the representation as of his own knowledge. In such cases the force and effect of the evidence will depend, in a great measure, upon the nature of the subject concerning which the representation was made. If it be with respect to a specific fact or facts, susceptible of exact knowledge, and the subject-matter be such as that the affirmation of knowledge is to be taken in its strict sense, and not merely as a strong expres-

¹ *McAleer v. Horsey*, 35 Md. 439; *Buschman v. Codd*, 52 Md. 202; *Farrar v. Churchill* 135 U. S. 609. It is not necessary that the false statement should have been the only reason why the other party made the contract. *Cook v. Gill*, 83 Md. 193; *Strong v. Strong*, 102 N. Y. 69. In the civil law, material fraud, without which the contract would not have been made, is called *dolus dans causam contractus*, and is ground for rescission, etc. But a false statement which only induces the other party to pay or do more than he would otherwise have done is called *dolus incidens*, and affords a claim for damages. In our law the defrauded party may in either case affirm or disaffirm and sue for damages.

² *Redgrave v. Hurd*, 20 Ch. D. 1, 21.

¹ *Lamm v. Port Deposit, etc., Assn.*, 49 Md. 233.

² 46 N. J. L. 380.

sion of belief, the falsehood in such a representation lies in the defendant's affirmation that he had the requisite knowledge to vouch for the truth of his assertions, and that being untrue, the falsehood would be wilful and therefore fraudulent. But where the representation is concerning a condition of affairs not susceptible of exact knowledge, such as representations with respect to the credit and solvency of a third person, or the condition or credit of a financial institution, the assertion of knowledge, as was held in *Haycraft v. Creasy*,³ "is to be taken *secundum subjectam materiam*, as meaning no other than a 'strong belief founded upon what appeared to the defendant to be reasonable and certain grounds.' In such case the question is wholly one of good faith."

In such cases it may be said that "the fraud consists in stating that the party knows the thing to exist when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge."⁴

Belief in statement without reasonable ground for it. If a man makes an inaccurate statement of fact which he honestly believes to be true, but when he has no reasonable ground for such belief, the question whether such misrepresentation is fraud so as to entitle the person to whom it was made, to recover in an action of deceit for the loss suffered in consequence of his having relied on it in making a contract, is not an easy one to answer when looked at from both sides. It is simple if looked at from either side exclusively. The person making the statement is innocent of any moral wrong and may consider it a hardship that he should be made liable for his mere lack of sound judgment in taking a

³ 2 East, 92.

⁴ *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403. See also, *Cooper v. Schlessinger*, 111 U. S. 152; *Bullitt v. Farrar*, 42 Minn. 8; *Hogan v. Wixted*, 138 Mass. 270; *Schneider v. Schneider*, 125 Iowa, 1; *Prewitt v. Trimble*, 92 Ky. 176; *Huntress v. Blodgett*, 206 Mass. 318.

thing to be true for an inadequate reason. But the person who relied upon the statement so made to him may also fairly deem that the party who induced him to contract should be responsible if he made the statement without a good reason for believing it and that the mere honesty of his belief should not be an excuse.

Accordingly, there are different rulings on the subject. Some cases hold that a misrepresentation of fact made by one who has not reasonable grounds for believing it to be true is fraudulent in law, although he may be honest in his belief⁵

Other cases, which are of high authority, hold that the absence of reasonable ground for believing a statement to be true does not render it fraudulent, and that the absence of such reasonable ground is merely evidence that the party making the statement did not honestly believe it to be true.⁶

⁵ *Kathan v. Comstock*, 140 Wis. 427; 28 L. R. A. (N. S.) 202; *Aldrich v. Scribner*, 154 Mich. 123; 18 L. R. A. (N. S.) 379; *Bullitt v. Far-rar*, 47 Minn. 8; 6 L. R. A. 149; *Buchanan v. Barrett*, 102 Tex. 492; *Lindsey v. Veasey*, 62 Ala. 421.

⁶ *Donnelly v. Balto. Trust Co.*, 102 Md. 13; *Kountze v. Kennedy*, 147 N. Y. 124; 29 L. R. A. 360; *Hadcock v. Osmer*, 153 N. Y. 604; *Nash v. Minn. Title, etc., Co.*, 163 Mass. 574; 28 L. R. A. 753; *Lamberton v. Dunham*, 165 Pa. 129; *Hicks v. Stevens*, 121 Ill. 186; *Bowers v. Kettleman*, 142 Ill. 96; *Boddy v. Henry*, 113 Iowa, 468; 53 L. R. A. 772; *Lord v. Goddard*, 13 Howard, 198. (But see *Southern Devel. Co. v. Silva*, 125 U. S. 250; *Lehigh Zinc Co. v. Bamford*, 150 U. S. 673, *contra.*) In *Boulden v. Stilwell*, 100 Md. 552, the Court said: "A misrepresentation believed by the speaker to be true, though induced by his ignorance or negligence, will not sustain an action for deceit. There must be either knowledge of the falsity of the representation or such reckless indifference to truth in making it, as is held equivalent to actual knowledge." But in *Robertson v. Parks*, 76 Md. 131, it is said: "If a defendant knowingly tells a falsehood or makes a representation of a fact as true when he does not know it to be true *and has no reasonable grounds for believing in its truth*, with an intent to induce and does thereby induce the plaintiff to enter into a contract, or incur liability, which but for such misrepresentation he would not have entered into or incurred, and the plaintiff is thereby damaged, a case of fraudulent deceit is established." In *Cahill v. Applegarth*, 98 Md. 493, it was held that the circumstance that a person who made an untrue statement could, by the exercise of ordinary care, have ascertained that the statement was false, does not constitute in itself such fraud as will support an action of deceit.

In *Derry v. Peek*,⁷ a tramway company was authorized by Act of Parliament to run its carriages by animal power, and, with the consent of the Board of Trade, by steam or other mechanical power. The directors thought that the consent of the Board of Trade would be given as a matter of course, and issued a prospectus, stating that the company had the right to use steam as well as horses. Plaintiff bought shares in the company on the faith of this prospectus to the extent of £4,000. The Board of Trade refused permission to the company to use steam on certain portions of the line; the company failed and was wound up. Plaintiff sued the directors for damages for fraudulent statement. The trial Court held that the directors were not liable for fraud, since they honestly believed that they had the rights stated in the prospectus and had reasonable grounds for that belief. The Court of Appeal held that the directors were liable to the plaintiff for fraud, because, even if they believed the statement in the prospectus to be true, yet there was no reasonable ground for such belief. The House of Lords held that the directors were not liable for fraud, because they honestly believed that the statement in the prospectus was true, and it was immaterial whether the grounds on which that belief was founded were reasonable or unreasonable. Lord Herschell said: "I think the authorities establish the following propositions:—First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made—(1) knowingly; or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false. Although I have treated (2) and (3) as distinct cases, I think (3) is but an instance of (2), for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that

which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.”⁸

It would seem that when the statement of a fact is made by a man of affairs, such as a director of a corporation or a promoter, the fact that there is no reasonable ground for believing it to be true should be taken as very strong if not conclusive evidence that he did not honestly believe it. If a man has special means of knowing a fact or could easily inform himself upon inquiry, his statement that it is true when it is not, should be regarded as fraudulent, for he does not avail himself of the means of information within his reach. “If when a man thinks it highly probable that a thing exists, he chooses to say he knows the thing exists, that is really asserting what is false—it is positive fraud.”⁹

§ 84. **Statement of Ascertainable Fact.** The representation must generally be in respect of an ascertainable fact as distinguished from a mere matter of opinion. So a promise or representation as to a future event cannot in general be fraudulent so as to afford ground for the rescission of the contract on this ground if the promise is not performed.¹ But sometimes, as in representations concerning the credit and solvency of others, a false statement of opinion may be fraudulent.² A representation which only amounts to an expression of opinion, judgment or expectation, or is vague

⁸ The English Companies Act (1898) defines the circumstances under which directors are liable for an untrue statement in a prospectus. Under this statute, a director is liable if he does not have reasonable grounds for believing a statement to be true.

⁹ Lord Blackburn in *Brownlie v. Campbell*, 5 App. Cas. 953.

¹ *Knowlton v. Keenan*, 146 Mass. 86; *Lawrence v. Gayety*, 78 Cal. 126; *Birmingham Co. v. Elyton Land Co.*, 93 Ala. 549; *State Bank v. Gates*, 114 Iowa, 323. A statement by the seller of shares of stock that they would be valuable and pay as much as twenty per cent. dividends is not fraud in law. *Robertson v. Parks*, 76 Md. 118.

² *Cole v. Cassidy*, 138 Mass. 437; *Boulden v. Stilwell*, 100 Md. 543; *Cowley v. Smith*, 46 N. J. L. 380; *Page v. Bent*, 2 Met. 371; notes to *Pasley v. Freeman*, 2 Smith's Ldg. Cas. 176.

and indefinite in its nature or terms, does not constitute fraud.³ A false statement as to the *value* of an article which the buyer has an opportunity to inspect is not fraud.⁴ But a false statement as to the *cost* of an article is fraudulent, for that is obviously a known or ascertainable fact.⁵

A false statement by the buyer of property as to his *motive* in desiring to make the purchase, when it does not involve any false statement of fact on which the seller has a right to rely, does not constitute such fraud as will entitle the seller to rescind the contract.⁶ A false statement as to the real ownership of property sold by the defendant to the plaintiff is not necessarily fraudulent, since it may not have induced the plaintiff to make the purchase.⁷

"It is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion * * * But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts the best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."⁸

³ *Gordon v. Butler*, 105 U. S. 553; *Buschman v. Codd*, 52 Md. 207. But an assertion by a man that he owns certain property in fee simple is not a mere opinion upon a question of law. *Hurlbert v. Kellogg Co.*, 115 Wis. 225.

⁴ *Geddes' Appeal*, 80 Pa. St. 462; *Deming v. Darling*, 148 Mass. 504. But under some circumstances a false statement as to value is fraudulent. *Picard v. McCormick*, 11 Mich. 68.

⁵ *Pendergast v. Reed*, 29 Md. 398; *Teachout v. Van Hoesen*, 76 Iowa, 113; *Fairchild v. McMahon*, 139 N. Y. 290. *Contra*: *Ray v. Ryther*, 165 Mass. 226.

⁶ *Byrd v. Rantman*, 85 Md. 414. It was held in *Edgington v. Fitzmaurice*, 29 Ch. D. 459, that a false statement by a borrower to a lender as to the use the former intended to make of the money, which statement induced the latter to make the loan, is actionable fraud.

⁷ *Cahill v. Applegarth*, 98 Md. 493.

⁸ *Bowen, L. J.*, in *Smith v. Land and House Prop. Corporation*, 28 Ch. D. 7. In this case it was held that the statement by the vendor of a hotel that it was leased to "a most desirable tenant," was fraudulent, since he knew that it was difficult to collect the rent from the tenant. *Cf. McShane v. Hazlehurst*, 50 Md. 107.

§ 85. **Designed to Deceive the Other Party.** The representation must have been made with the fraudulent intent to deceive the other party.¹ A party is not liable for representations addressed to others in no wise connected with the plaintiff.² It is not necessary, however, that the false representation should be made directly to the other party; it is sufficient to give him a right of action if they were made to a third party, with the intent that plaintiff should rely upon them.³ Therefore, false statements made by a man to a commercial agency concerning his financial status and solvency, or that of his firm, are not mere expressions of opinion but of fact, and entitle the person who relied upon them to all the remedies of a defrauded party.⁴ And when the false representation is made to the world at large as in the case of a prospectus asking for subscriptions to a company, any one injured by relying upon it has a right of action.⁵

§ 86. **Deception and Injury—Right to Rely on Statement.** Fraud has no effect upon a contract unless the person upon whom it was practised is injured by it, and consequently if he knows that the statement is not true, or disregards it, he cannot complain, for he has not been deceived.¹ If he chooses to complete the performance of the contract after obtaining knowledge of the fraud, he has no right of action on account of it.²

¹ *Cochran v. Pascault*, 54 Md. 13; *Buschman v. Codd*, 52 Md. 202; *Adams v. Anderson*, 4 H. & J. 558; *Langridge v. Levy*, 2 M. & W. 579.

² *Phelps v. George's Creek, etc., Co.*, 60 Md. 536; *Peck v. Gurney*, L. R. 6 H. L. 377; *Brackett v. Griswold*, 112 N. Y. 454.

³ *Henry v. Dennis*, 95 Me. 29; *Hunnewell v. Duxbury*, 154 Mass. 286.

⁴ *Courtney v. Knabe & Co.*, 97 Md. 499; *Soper Lumber Co. v. Halstead Co.*, 73 Conn. 552; *Tindle v. Birkett*, 171 N. Y. 520; *Eaton v. Avery*, 83 N. Y. 31; *Gainesville Bank v. Bamberger*, 77 Tex. 48.

⁵ *Reese, etc., Mining Co. v. Smith*, L. R. 4 H. L. C. 64; *Vreeland v. Stone Co.*, 29 N. J. Eq. 188.

¹ *Marshall v. Hubbard*, 117 U. S. 415; *Farrar v. Churchill*, 135 U. S. 616; *Ely v. Stewart*, 2 Md. 408.

² *Fitzpatrick v. Flannagan*, 106 U. S. 640; *Kingman & Co. v. Stoddard*, 85 Fed. 740; *Railroad Co. v. Jolly*, 71 Ohio St. 128; *Gilchrist v. Manning*, 54 Mich. 210; *People v. Stewart*, 71 N. Y. 527.

It is sometimes said that a man cannot ask relief on account of a fraudulent statement made to him if he was *negligent* in believing it, or if he could easily have ascertained its falsity, or if it was such a statement as would not have deceived an ordinarily prudent person.³

But the correct principle is that it is as much a fraud to deceive a credulous person with an improbable falsehood as it is to deceive a sagacious person with a plausible one.⁴ The circumstance that the false statement was improbable is only evidence that the person to whom it was made did not believe it or was not influenced by it. The weight of authority and of reason establishes the general rule that the person to whom a statement of fact relating to a contract is made by the other party has a right to rely on it, and the circumstance that even a slight investigation would have enabled him to ascertain its falsity does not prevent him from resort-

³ *Slaughter v. Gerson*, 13 Wall. 379; *Cleveland v. Richardson*, 132 U. S. 318; *Shapiro v. Goldberg*, 192 U. S. 232; *Keller v. Orr*, 106 Ind. 406; *Brown v. Leach*, 107 Mass. 368; *Brady v. Finn*, 162 Mass. 260. (But see *Whiting v. Price*, 172 Mass. 241.) In *Kaiser v. Nummerdor*, 120 Wis. 234, the defendant, the seller of a stock of boots and shoes, falsely represented to the plaintiff, the buyer, that they had been inventoried by one K. at \$8,500, and plaintiff was thereby induced to purchase. On the last page of the inventory 20 footings were brought together in one column and there added up to an original total of \$6,531. When plaintiff had the book the figure 6 in the total had been changed to 8. The Court said: "The plaintiff had full and complete means of knowledge of the true total of the inventory at the expense of only the effort of adding up the column of twenty items. He could have discovered that \$8,500 was clearly incorrect and excessive by merely running his eye over the column of hundreds. The question whether the incorrectness of the total was so obvious that the plaintiff ought to have observed it was properly for the jury." And their finding that the plaintiff as an ordinarily prudent man did not have the right to rely upon the defendant's representation as true was upheld. This seems to be a fantastic application of the theory of contributory negligence, and is in conflict with the previous case in that State of *Barndt v. Frederick*, 78 Wis. 1. Such a rule would appear to mean that if Rusticus ventures to match his wits in bargaining with Overreach, and is deceived by some absurd falsehood, he must pay for his folly.

⁴ *New England Ins. Co. v. Swain*, 100 Md. 558. See also, *Kendall v. Wilson*, 41 Vt. 567.

ing to the remedies of a defrauded party if he was deceived by such fraudulent statement.⁵

§ 87. **Concealment when Fraudulent.** The general rule is that the concealment or the failure to disclose an independent fact relating to the subject-matter of the contract is not fraudulent. If the buyer of land, for instance, knows that there is a valuable mine on it, or that oil has been discovered on the adjoining property, or that certain improvements to be made by others will greatly increase the value of the land, it is not his legal duty to disclose such facts.¹ When there is no fiduciary relation between the parties contracting with one another, there is no obligation on the part of either to disclose a fact exclusively within his knowledge which may influence the value of the subject-matter, and mere silence as to such fact is not a fraudulent concealment.²

After the defeat of the English at the battle of New Orleans, in January, 1815, they retired to their ships which remained below the city for several weeks. While that was the situation, plaintiff and defendant, two merchants in New Orleans, were negotiating for the purchase by the former of 111 hogsheads of tobacco. One night, the plaintiff heard from a person who had come to the city from the fleet, that a treaty of peace between the United States and Great Britain had been signed by the plenipotentiaries at Ghent. The battle had in fact been fought after the treaty was made. Early the next morning, before this news became public, the plaintiff went to the defendant and offered to buy the tobacco at the price named. Defendant asked if there was any news.

⁵ *Kehl v. Abram*, 210 Ill. 218; *Redgrave v. Hurd*, 20 Ch. D. 1; *Lovejoy v. Isbell*, 73 Conn. 368; *Smith v. Smith*, 134 N. Y. 62; *Morrill v. Madden*, 37 Minn. 282. See cases relating to the right to rely upon representations collected in note to *Fargo, etc., Co. v. Fargo Gas Co.*, 37 L. R. A. 593. One who signs a contract without reading it on account of false representations as to its contents may avoid the same for fraud. *Alexander v. Broxley*, 62 N. J. L. 584.

¹ *Standard Steel Car Co. v. Stamm*, 207 Pa. 425.

² *Chicora Fer. Co. v. Dunan*, 91 Md. 144; *Walters v. Morgan*, 3 DeG. F. & J. 718; *Turner v. Green* [1895], 2 Ch. 205.

To this the plaintiff made no definite reply. The sale was concluded, and afterwards, when the defendant heard of the peace, which greatly increased the value of the tobacco, he refused to carry out the bargain. In an action for damages for breach of the contract, it was held that he was liable and that the concealment was not a fraud.³ Marshall, C. J., said: "The question in this case is whether the intelligence of extrinsic circumstances which might influence the price of the commodity and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor. The Court is of the opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within the proper limits when the means of intelligence are equally accessible to both. But at the same time each party must take care not to say or do anything tending to impose upon the other."⁴

There are, however, certain cases for which no general rule can be laid down, in which the concealment of a material fact is fraudulent, because there is a duty to disclose it; cases in which the *suppressio veri* amounts to a *suggestio falsi*. "In an action of deceit," said the Supreme Court,⁵ "it is true that silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation. But mere silence is quite different from concealment, *aliud est tacere, aliud celare*, a suppression of the truth may amount to a

³ Laidlaw v. Organ, 2 Wheaton, 168. Cf. Sides v. Hilleary, 6 H. & J. 86.

⁴ Cicero (*de Officiis*, 3) speaks of a case where a merchant with a cargo of grain arrives at Rhodes in a time of famine, knowing that other grain ships will soon arrive. Should this fact be communicated? He quotes the opinion of Diogenes, who thought that the merchant could lawfully conceal his knowledge and sell his grain at famine prices, but Cicero thought otherwise. This, of course, will be the opinion of a man with a nice sense of honour, but the ethics of such a man are not the ethics of the market place or even of the forum. The law only requires that a man shall abstain from positive and active deceit. Pothier, who had a high standard concerning what is fair dealing, considers that in the case mentioned by Cicero there was no fraud in the concealment. *Traité du contrat de vente*, part ii, ch. 2, n. 242.

⁵ Stewart v. Wyoming Ranch Co., 128 U. S. 388.

suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of, and equivalent to, a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

If one in selling a promissory note conceals the fact that the maker is insolvent, that is a fraud.⁶ So if the vendor of land does not disclose a defect in his title which is not apparent on his title deeds, his silence is fraud.⁷ In the sale of personal property, concealment by the seller of the fact that he has no title is fraudulent.⁸

When a man on the eve of his marriage makes a voluntary conveyance of all of his property, reserving a life interest therein to himself, for the purpose of defeating the marital rights of his intended wife, the conveyance being made without her knowledge, although no actual misrepresentation was made to her, such deed is in fraud of the wife and will be vacated in equity.⁹

One who sells a diseased animal or an article which he knows to be dangerous to life or property, and conceals that

⁶ *Sebastian May Co. v. Codd*, 77 Md. 293; *Brown v. Montgomery*, 20 N. Y. 287; *Booth v. Powers*, 56 N. Y. 31. If a man in selling a bull to a farmer, knowing that he wants it for breeding purposes, conceals the fact that the animal is indifferent to the charms of the female of his species, that is fraud. *Maynard v. Maynard*, 49 Vt. 297. And so selling a horse blind in one eye, without disclosure, is fraudulent. *Hughes v. Robinson*, 1 T. B. Mon. 215.

⁷ *Bryant v. Boothe*, 30 Ala. 311.

⁸ 2 Blackstone, Com. 165; *Hoe v. Sanborn*, 21 N. Y. 552. There is also in such case an implied warranty of title.

⁹ *Collins v. Collins*, 98 Md. 473. See also, *Kline v. Kline*, 57 Pa. 120; *Kelly v. McGrath*, 70 Ala. 79. As to such ante-nuptial fraud on the husband, see *Taylor v. Pugh*, 1 Hare. 603.

fact, not only perpetrates a fraud on the other party but is guilty of a wrong independent of contract which makes him liable in an action of deceit to a third person who has suffered an injury in consequence of the fraudulent concealment.¹⁰

A fraudulent concealment to be actionable must actually deceive the other party, but a striking misapplication, as it seems to me, of this principle was made in the case of *Horsfall v. Thomas*.¹¹ There the defendant ordered a cannon to be manufactured for him by the plaintiff, and accepted it when made without an inspection, giving a bill of exchange for the price. The seller had concealed a vital defect at the breech by means of a metal plug. After a few shots had been fired the gun burst, and then the defendant, for the first time, discovered the defect. He refused to pay the bill on the ground that the concealment of the defect by the plug amounted to a fraudulent representation that the gun was sound. The Court held that since he had not examined the cannon, "it was impossible that this attempt at concealment should have had any operation on his mind," and therefore he must pay.

Now, a completely executed contract may be rescinded afterwards when the injured party discovers the fraud practiced either in obtaining his consent or in a matter connected with its performance. The buyer of the cannon, when he came to use it, could have discovered the defect if it had not been concealed by the plug, and could then have rescinded the contract. The concealment seems to have been just as clearly fraudulent, as the sale of a diseased animal or of a promissory note by an insolvent maker in the cases previously referred to.¹² This is not like the case of a man who buys shares of stock in a company without having seen a pros-

¹⁰ *Knelling v. Lean Mfg. Co.*, 183 N. Y. 78; *Provost v. Cook*, 184 Mass. 315; *State v. Fox*, 79 Md. 514.

¹¹ 1 Hul. & C. 99; 31 L. J. Ex. 322.

¹² Notwithstanding the criticism of *Horsfall v. Thomas* by Cockburn, C. J., in *Smith v. Hughes*, L. R. 6 Q. B. 625, Sir W. Anson says that the decision "seems to be founded in reason." I must admit also that the case is cited in *Pollock on Contracts* with approval.

pectus containing false statements, and therefore without being influenced by them. Here the defect is such as to impose a duty to make disclosure. The seller ought not to have been allowed to recover even if he had made no attempt at concealment.

Purchase by insolvent. If a man makes a promise without any intention of performing it for the purpose of inducing another party to act and thereby deceiving and injuring him, the concealment is fraudulent.¹³

If, at the time of making a purchase, the buyer makes no representation as to his financial condition, the fact that he is then really insolvent does not necessarily amount to fraud.¹⁴ If he intended to pay, his action is not fraudulent, although as a matter of fact he was then insolvent.¹⁵ But the purchase of goods on credit with the preconceived design of not paying for them is fraud.¹⁶

Knowledge by one party of the other party's mistake. The principle is stated by Sir W. Anson, based on the case of *Smith v. Hughes*,¹⁷ that where there is a mistake as to the nature of the promise known to the party promising, the contract is void for *mistake* and not voidable for fraud.

¹³ *Dowd v. Tucker*, 41 Conn. 197; *Goodwin v. Horne*, 60 N. H. 485. In *Edgington v. Fitzmaurice*, 29 Ch. D. 459, Bowen, L. J., says: "The state of a man's mind is as much a fact as the state of his digestion."

¹⁴ *Digges v. Denny*, 86 Md. 116; *Powell v. Bradlee*, 9 G. & J. 220; *Stilwell v. Swarthout*, 81 N. Y. 109. See, *Peters v. Hilles*, 48 Md. 506. But when the buyer, upon being questioned as to his financial condition, correctly stated his assets but did not disclose the fact that he owed nearly as much, the concealment was held to be fraudulent. *Newell v. Randell*, 32 Minn. 171.

¹⁵ *Hall v. Naylor*, 18 N. Y. 588; *Brackett v. Griswold*, 112 N. Y. 454; *Kitson v. Farwell*, 132 Ill. 327; *Zucker v. Karpeles*, 88 Mich. 413; *Dalton v. Thurston*, 15 R. I. 418; *Com. v. Eastman*, 1 Cush. 189, 221; *Diggs v. Denny*, 86 Md. 116; *Standard Horse Shoe Co. v. O'Brien*, 88 Md. 335; *Courtney v. Knabe & Co.*, 97 Md. 499. It is said in some of these cases that if he has no reasonable expectation of being able to pay, the purchase is fraudulent, but most decisions hold that this alone is not fraud.

¹⁶ *Donaldson v. Farwell*, 93 U. S. 633; *Harris v. Alcock*, 10 G. & J. 226; *Ayres v. French*, 41 Conn. 142. See cases in notes 13, *supra*.

¹⁷ L. R. 6 Q. B. 597.

Thus, to take his illustration, A. offers to sell to B. a piece of china. * B. thinks that it is Dresden china. A. knows that it is not, but has made no representation that it was. B. thinks that A. did represent it to be Dresden china. A. knows that B. is under that impression, but says nothing to correct it. I venture to submit that the contract made under these circumstances is voidable for fraud. The cases previously cited in this section would seem to show that A.'s silence is a fraudulent concealment. Although a man did not say a certain thing, still, if he knows that the person with whom he is dealing thought that he did say it, and is contracting upon that assumption, he is as much bound to correct that mistake as he is bound by the rule that he will be taken to mean what the other party fairly implied from his words or conduct that he did mean.

§ 88. **Effects of Fraud—Remedies.** When a contract has been obtained by fraud as distinguished from misrepresentation the injured party may bring an action at law for deceit, in which he recovers the damages suffered. In this action he must show that the defendant made a false representation of fact, known to be false, which deceived the plaintiff and caused him to suffer loss. The action must be brought within the time prescribed by the statute of limitations, but it is generally provided in such statutes that if a party be kept in ignorance of the fraud, limitations do not begin to run until he discovers the fraud, or by the exercise of due diligence could have discovered it. But it is not necessary to show a distinct and independent fraud by the defendant for the purpose of keeping the plaintiff in ignorance of his cause of action.¹ *Fraus est celare fraudem.*

Apart from this action, the rights of the defrauded party are as follows:

¹ New England Ins. Co. v. Swain, 100 Md. 558.

(1) He may affirm the contract and sue for damages, or may set up the damages as a defence to an action on the contract.²

(2) He may avoid the contract, and

(a) resist an action on it at law.³ The fraud of the plaintiff in such case is an answer to the whole demand or in reduction of damages, according to circumstances. If the defendant has offered to return what he received under the contract, he may defeat an action for the price.⁴ But it is not necessary to return if there has been a total failure of consideration, or if the defendant made that impossible.⁵

(b) Where goods have been obtained by the fraud of the buyer, the seller, upon avoiding the contract, may maintain replevin against the buyer, or against his assignee for the benefit of creditors.⁶ Or, he may recover their value in an action of tort. But if the seller does not disaffirm, but sues on the contract, he is bound by its terms, and cannot maintain the action before the money becomes due.⁷

(c) He may obtain the avoidance and cancellation of the contract in equity.⁸ Plaintiff, a manufacturing company, about to begin business, bought certain boilers from defendant. In its dealings with defendant, plaintiff relied wholly upon the representations of its own engineers, who declared that the boilers made by defendant were good and adequate

² Applegarth v. Robinson, 65 Md. 493; Lamm v. Port Deposit Assn., 49 Md. 233; Gent v. Ensor, 41 Md. 24; Hoopes v. Strasburger, 37 Md. 391. The action for damages affirms the contract and relies on it. Nat. Bank & Loan Co. v. Petrie, 189 U. S. 425 Whiteside v. Brawley, 152 Mass. 133.

³ Groff v. Hansel, 33 Md. 161; Clement v. Smith, 9 Gill, 156, *note*.

⁴ Penniman v. Winner, 54 Md. 127.

⁵ Groff v. Hansel, 33 Md. 161; Findley v. Balto. Trust Co., 97 Md. 716.

⁶ Benesch v. Weil, 69 Md. 276. See cases in note 21, *infra*.

⁷ Dellone v. Hull, 47 Md. 115. But in Heilbrom v. Herzog, 165 N. Y. 99, it was held that the defrauded seller of goods may waive the tort and sue in *assumpsit* for the price without waiting for the expiration of the term of credit.

⁸ Jackson v. Hodges, 24 Md. 463; Dunnington v. Hubbard, 65 Md. 88; Rosenthal v. Mahon, 65 Md. 418.

to the work. After the payment of most of the purchase money, it was discovered that the boilers did not comply with the specifications and could not be made to do so, although plaintiff's engineers continued to represent that the defects could be remedied. Subsequently plaintiff learned that defendant's agent had bribed the engineers of the plaintiff to certify falsely and corruptly that the boilers were satisfactory, and thereby induced plaintiff to accept and pay for the same. It was held that the plaintiff was entitled to maintain a bill in equity for the cancellation of the contract of sale, and for the recovery of the money paid thereunder and for an injunction restraining an action at law by the defendant to recover the balance of the purchase money.⁹

(3) If the person defrauded elects to rescind the contract, he must return or offer to return what he received under it, so that the parties may be placed *in statu quo* as far as practicable.¹⁰ But if the thing received by the defrauded party has perished without his fault, or is of no value, or if, for any sufficient reason, it cannot be returned, then the contract may be rescinded without an offer to return, or compensation may be made.¹¹ He must manifest his election within a reasonable time.¹² Delay in rescinding counts from the time when by due diligence the fraud might have been discovered.¹³ The mere bringing of an action on the contract, unless it was

⁹ *Sugar Refining Co. v. Campbell & Zell Co.*, 83 Md. 36. See also, *Perry v. Boyd*, 126 Ala. 162.

¹⁰ *Estabrook v. Swett*, 116 Mass. 303; *Doughton v. Camden Assn.*, 41 N. J. Eq. 566; *Babcock v. Case*, 61 Pa. 427.

¹¹ *Neblett v. Macfarland*, 92 U. S. 101; *Findley v. Baltimore Trust Co.*, 97 Md. 716; *Flynn v. Allen*, 57 Pa. 482; *Crosland v. Hull*, 33 N. J. Eq. 111; *Baker v. Levy*, 67 N. Y. 304; *Hammond v. Pennock*, 61 N. Y. 304.

¹² *Pence v. Langdon*, 99 U. S. 578; *Latrobe v. Dietrich*, 114 Md. 8; *Foley v. Crow*, 37 Md. 62; *Schiffer v. Dietz*, 88 N. Y. 300; *Strong v. Strong*, 102 N. Y. 60; *Rackman v. Riverbank Co.*, 167 Mass. 1. A bill to rescind an executed contract for fraud filed more than three years after the contract was made, and a year after plaintiff acquired full knowledge of all the facts will be dismissed. *Byrd v. Rantman*, 85 Md. 414.

¹³ *Redgrave v. Hurd*, 20 Ch. D. 1.

brought with knowledge of the fraud, is not a binding election, or a waiver of the right to rescind.¹⁴

If after discovery of the fraud he treats the contract as being still in force, that is a ratification which prevents a subsequent rescission.¹⁵ Affirmance, however, merely extinguishes the right to rescind. The remedy by way of an action of deceit remains.¹⁶

When a party who has knowledge of the fraud which gives him a right to rescind the contract, says to persons interested in its performance, although not parties to the contract itself, that he will not rescind provided certain things be done, and these persons, relying on that statement, do these things, then the party defrauded has made his election and the right to rescind the contract is lost.¹⁷

A subsequent avoidance of the contract does not affect a third party who has acquired, in good faith and for value, rights in the subject-matter.¹⁸ A sale induced by fraud is not void, but only voidable at the option of the seller, and the property passes subject to his right of avoidance.¹⁹

But the defrauded vendor may enforce his remedy against the goods by replevin, etc., against a party who takes them in satisfaction of a pre-existing debt, because such party is not a purchaser for value.²⁰ One is not such purchaser unless he has parted with money or other property upon the faith of the apparent title of the wrong-doer, and when he has himself

¹⁴ *Eq. Foundry Co. v. Hersee*, 103 N. Y. 25.

¹⁵ *Grymes v. Sanders*, 93 U. S. 55; *Pence v. Langdon*, 99 U. S. 578; *Troup v. Appleman*, 52 Md. 456; *Wyeth v. Walz*, 43 Md. 426. See *ante*, § 86, note 2, p. 190.

¹⁶ *Groff v. Hansel*, 33 Md. 116.

¹⁷ *Munich Reinsurance Co. v. United Surety Co.*, 113 Md. 200.

¹⁸ *Hall v. Hinks*, 21 Md. 406; *Higgins v. Lodge*, 68 Md. 229; *Lincoln v. Quynn*, 68 Md. 299; *Moore v. Moore*, 112 Ind. 149.

¹⁹ *Baird v. Mayor*, 96 N. Y. 567.

²⁰ *Ratliffe v. Sangston*, 18 Md. 390; *Hyde v. Ellery*, 18 Md. 501. But *cf.* *Tiedeman v. Knox*, 73 Md. 612.

no knowledge of the fraud.²¹ Therefore, an attaching creditor is not a *bona fide* purchaser,²² nor is a judgment or execution creditor;²³ nor is an assignee for the benefit of creditors.²⁴

²¹ *Barnard v. Campbell*, 58 N. Y. 73. The burden of proof is on the seller to show that the third party to whom the goods were transferred before the contest was rescinded for fraud was not a purchaser in good faith as well as for value. *Whitehorn Bros. v. Dawson* [1911], 1 K. B. 463. When the buyer of goods on credit obtains possession by fraud and ships them by a common carrier, receiving therefor a non-negotiable bill of lading to his order, the person to whom he transfers that bill of lading, who takes it *bona fide* and for value, acquires a valid title to the goods, since the bill of lading represents the property described in it. *Bank of Bristol v. B. & O. R. Co.*, 99 Md. 661.

²² *Atwood v. Dearborn*, 1 Allen, 483; *Thompson v. Rose*, 16 Conn. 71.

²³ *Knell v. Greene St. Assn.*, 34 Md. 67; *Devoe v. Brandt*, 53 N. Y. 466.

²⁴ *Nichols v. Michael*, 23 N. Y. 264; *Singer v. Schilling*, 74 Wis. 369; *Benesch v. Weil*, 69 Md. 276; *Foley v. Bitter*, 34 Md. 646.

CHAPTER VIII

DURESS AND UNDUE INFLUENCE

§ 89. **Duress in General.** It sometimes happens that a man is coerced and compelled against his will to give his apparent consent to a contract. The cause which abolishes his freedom of action and constrains him may be either a physical danger threatening his life or body or his liberty, insomuch that he thinks that unless he consents, some bodily harm will befall him; or it may be a moral compulsion resulting from fear of injury to himself or to a near relative or to his property.

At common law, a contract could not be avoided on the ground that the promisor had been coerced and compelled to consent except when physical violence or imprisonment had either been inflicted upon him or was threatened and impending which was severe enough to overcome his mind and will.¹ This was called duress, and if the violence or imprisonment was threatened only it was called duress *per minas*. It was also held originally that the violence or threat of it must be such as would overcome the will of a man of ordinary firmness. But later cases very properly modify this rule and declare that to be duress which does in fact coerce or intimidate a person, although it would not have influenced another man of ordinary courage.²

The question would really seem to be one of evidence. If the violence or threat of it was such as ought not to have constrained the average man, that is merely evidence that the person who alleges that he was coerced by it was not really deprived of his liberty of action. To determine whether in a particular case, the unlawful threat of bodily injury or

¹ *Brown v. Pierce*, 7 Wallace, 214; *U. S. v. Huckabee*, 16 Wallace, 432.

² *Galusha v. Sherman*, 105 Wis. 263; 47 L. R. A. 417; *Hartford Fire Ins. Co. v. Kirkpatrick*, 111 Ala. 456; *Cribbs v. Sowle*, 87 Mich. 340.

imprisonment did destroy a promisor's freedom of action, it is useless to inquire in the abstract whether the threat would have frightened an intrepid man. The question is, whether the promisor in the case at hand was thus coerced. If this were not the principle, then the protection of the law would be taken away from those most in need of it,—women, feeble old men and timorous invalids—and they would be made to suffer loss for mere lack of courage, not amounting to excessive pusillanimity. The question should be determined by reference to the age, sex and condition of the person who complains of duress.

The common law rule was that the threat must be against the other party himself or his parent, wife or child. Later cases very properly extend this category so as to include a brother or sister or other near relative.³ It has been held that where a husband threatened his wife that he would commit suicide unless she signed a certain promissory note, the signature so extorted was not void for duress, because the threat was not against the other party to the transaction.⁴ It would seem that a contract so obtained should be voidable on the ground that it was procured under the influence of fear according to decisions subsequently referred to.

§ 90. **Threat of Imprisonment or Prosecution.** If the imprisonment of the promisor be lawful, neither it nor the threat of it amounts to duress unless the other party imposed or threatened it for an unlawful purpose.¹ A mere threat to sue the defendant and to arrest him in such suit is not such duress as avoids a promise induced by such threat.² "It is not duress for one who believes that he has been wronged to threaten the wrong-doer with a civil suit, and if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution."³

³ *Sharon v. Gager*, 46 Conn. 189; *Bradley v. Irish*, 42 Ill. App. 85.

⁴ *Wright v. Remington*, 41 N. J. L. 48.

¹ *Baker v. Morton*, 12 Wallace, 157; *Guillaume v. Rowe*, 94 N. Y. 265; *Clark v. Turnbull*, 47 N. J. L. 265.

² *Durham v. Griswold*, 100 N. Y. 221.

³ *Hilborn v. Buckman*, 78 Me. 482. The person so threatened may defend himself. *Claffin v. McDonough*, 33 Mo. 412.

But if the imprisonment or prosecution, although lawful, is threatened for the purpose of exacting money or a promise, then it does amount to duress.⁴ When such is the case, the money or contract is really extorted by way of ransom. In *Morse v. Woodworth*,⁵ the Court said: "It has sometimes been held that threats of imprisonment to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them. In such a case, there is no reason why one should be bound by a contract obtained by force, which in reality is not his, but another's."

When a woman is induced to convey her property in order to save her husband from a prosecution for embezzlement, she may afterwards avoid the conveyance for duress, whether the prosecution was lawful or unlawful.⁶ Even if no actual threat of prosecution or imprisonment be made, a person who executes a contract or makes a conveyance in order to save a

⁴ *Bentley v. Robson*, 117 Mich. 691; *Wanzer v. Bright*, 52 Ill. 35.

⁵ 155 Mass. 233.

⁶ *Burton v. McMillan*, 52 Fla. 469; 8 L. R. A. (N. S.) 991; *Mack v. Prang*, 104 Wis. 1; 45 L. R. A. 407; *Adams v. Irving Nat. Bank*, 116 N. Y. 606. Appended to the case of *City Nat. Bank v. Kusworm*, 26 L. R. A. 41, is a note collecting cases relating to contracts procured by threats of prosecution of a relative.

son or other near relative is under duress if that was the real cause of his action and was known to be such by the other party.⁷

Such agreements not to prosecute for embezzlement are often void for illegality as being in effect the compounding of a felony. But since the parties are not *in pari delicto*, relief to the party under duress is not refused for that reason.

§ 91. **Duress Exerted by Stranger.** It is commonly laid down that in order to be a ground for avoidance of a contract, the duress must have been exerted upon the promisor by the other party, or if by a third party then with his knowledge.¹ There is much to be said in favor of the view that if the duress be exerted by a stranger without the knowledge of the person who benefited by it, still the contract should be voidable.² The duress did in fact destroy the promisor's freedom of will, and so far as that is concerned, it makes no difference whence came the coercion. Moreover, the duress may have been exerted in some hidden, covert way by the other party, so that the promisor may not be able to prove that the person who threatened him was the agent of the other party, or the threat may have been made by some unknown person.

⁷ *Benedict v. Roome*, 106 Mich. 376; *Williams v. Bayley*, L. R. 1 H. L. 209.

¹ *Dent v. Long*, 90 Ala. 172; *Compton v. Bank*, 96 Ill. 301; *Fairbanks v. Snow*, 145 Mass. 153; *Graham v. Burch*, 44 Minn. 33.

² *Bentley v. Mackay*, 31 Beav. 143, seems to leave the question in doubt. The French and Italian Civil Codes (art. 1111 in both) provide that duress (*violence*, *violenza*,) exerted against him who contracted the obligation is a ground for avoidance, although it was exerted by a third party other than the person for whose benefit the agreement was made. In *Central Bank v. Copeland*, 18 Md. 319, where a husband by duress compelled his wife to execute a mortgage of her property to secure a debt due by him, the Court said, that the fact that the mortgagees "personally took no active part in procuring the execution of the mortgage by Mrs. Copeland, does not strengthen their right to set it up as a valid deed, nor does it impair her right to avoid it. Its execution was procured by the husband acting in their interest and for their benefit, and as their acceptance of the mortgage implied an adoption of his agency, they can have no right to enforce it free from the infirmities originating in this use of unconscionable means to compel its execution."

§ 92. **Extension of the Term Duress—Fear.** The common law, as has just been seen, restricted the term duress to corporeal violence or restraint exerted by one party to a contract who thereby intimidated the other and extorted his consent. According to the present usage in America the word duress is also used to designate the coercion of a person's will by means of fear or terror generally, and also to designate the compulsion exerted when one man takes advantage of another's dangerous plight or necessitous condition to compel the execution of a contract.

When a man struggling with a murderous footpad promises a great sum to a passer-by if he will deliver him; when a mother promises all her fortune to anyone who will rescue her child from drowning or from a burning building; when a monarch on a desperate field of battle cries out: "My kingdom for a horse"—in all such cases, it may well be considered that the agreement is not enforceable by the person who renders the services asked for because there was a temporary lack of capacity to contract on the part of the promisor, caused by his perturbation of mind. When the terror and dismay are such as to upset the mind and subjugate the will, liberty of choice is destroyed and the consent vitiated.

But when the fear, although not such as to destroy the capacity to contract by reason of fright and dismay, yet is the real reason why the consent is given, and the other party takes advantage of that fear, the contract is voidable for duress.¹ If one man finds another lying by the roadside with a broken leg, and demands an exorbitant sum to take him to a place of refuge, which is promised, he has taken unfair advantage of another's distress, and that contract is voidable for duress. If a woman fears that if the knowledge of her son's embezzlement is communicated to her husband, it will make him insane, and promises money to a person who threat-

¹ When fear, not amounting to panic and dismay, induces a man to contract, he does in fact consent, because he chooses to contract rather than endure the threatened harm, as the lesser of two evils. *Si metu coactus, tamen coactus volui.* Dig. 4, 2, 21, § 5.

ens to tell her husband if he will keep silence, that promise is obtained by duress.²

Also when the fear is not for life or limb or personal safety, but merely of the destruction of property, a contract so extorted is voidable for duress.³ A contract is voidable, whether under seal or not, when the promisor was induced to execute it by a threat of the other party to destroy valuable property in his possession belonging to the promisor.⁴ If a railway company refuses to transport a man's cattle, then in its possession, unless he will sign a contract which the company has no right to demand, it is voidable for duress.⁵

It cannot, however, be alleged that a contract was obtained by duress merely because the promisee threatened not to carry out another contract with the promisor unless it was made.⁶

² *Silsbee v. Webber*, 171 Mass. 378.

³ In *Galusha v. Sherman*, 105 Wis. 265; 47 L. R. A. 423, the Court said: "The question in each case is, Was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person, or *his property*, or the person or liberty of his wife or child, the advantage thereby obtained cannot be retained." In *U. S. v. Huckabee*, 16 Wall. 414, the Court said: "Decisions of high authority adopt a more liberal rule, and hold that contracts procured by threats of battery to the person or of destruction of property may be avoided by proof of such facts." See *Cleveland v. Smith*, 132 U. S. 318; *Spaids v. Barrett*, 57 Ill. 289; *Motz v. Mitchell*, 91 Pa. 114.

⁴ *Moore v. Putts*, 110 Md. 490. In *Central Bank v. Copeland*, 18 Md. 319, one of the elements of the duress by which a husband compelled his wife to execute a mortgage of her property was a threat to burn it down if she refused.

An agreement made by an employer in consequence of a threat of a strike by his employees is voidable for duress. *O'Brien v. People*, 216 Ill. 354.

⁵ *St. Louis, etc., R. Co. v. Gorman*, 79 Kan. 643; 28 L. R. A. (N. S.) 638.

⁶ *Silliman v. U. S.*, 101 U. S. 465; *Dickson v. Fowler*, 114 Md. 344; *Armstrong v. Latimer*, 165 Pa. 389.

§ 93. **Money Paid Under Compulsion.** While the common law doctrine of duress was confined within the narrow limits previously mentioned, a practical remedy was afforded in many cases to a person who had been compelled to pay money under circumstances of compulsion. The rule is that money paid in consequence of a moral compulsion, when it was not legally due, may be recovered back. Thus, if one pays money to release his property from improper detention, he may recover it.¹ If a mortgagor pays more than is due in order to prevent a sale of his property, he may recover the excess.² If excessive rates are paid to a common carrier,³ or excessive fees to an officer for doing his duty,⁴ the payments are compulsory. "To constitute the coercion of duress, which will be regarded as sufficient to make a payment involuntary * * * there must be some actual or threatened exercise of power possessed or believed to be possessed by the party exacting or receiving the payment over the person or property of another from which the latter has no other means of immediate relief than by making the payment."⁵

The general principle under which money thus paid by compulsion may be recovered was thus expressed by Lord Mansfield in his famous judgment in *Moses v. Macfarlane*,⁵ speaking of the action of *assumpsit* for money had and received: "It lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition or extortion, or oppression, or an undue advantage taken of the party's situation, contrary to laws made for the protection of persons under those circumstances."

¹ *Loneragan v. Buford*, 148 U. S. 581; *Baltimore City v. Lefferman*, 4 Gill, 425; *Myers v. Smith*, 37 Md. 112; *Bradford v. Chicago*, 25 Ill. 420; *Chandler v. Sawyer*, 114 Mass. 364; *Flower v. Lance*, 59 N. Y. 610; *Pemberton v. Williams*, 87 Ill. 15.

² *Close v. Phipps*, 7 M. & G. 586.

³ *Parker v. Western R. Co.*, 7 M. & G. 253; *Baldwin v. S. S. Co.*, 74 N. Y. 125.

⁴ *Elliott v. Swartwout*, 10 Peters, 137; *Robertson v. Frank*, 132 U. S. 17; *Swift v. U. S.*, 111 U. S. 22.

⁵ *Radich v. Hutchius*, 95 U. S. 213.

⁶ 2 Burrows, 1000.

§ 94. **Undue Influence.** Some of the instances in which one party has taken advantage of the necessitous circumstances of another, or of the fear inspired by danger to person or property, to exact an unfair contract have been treated in Equity as the exertion of undue influence.¹ In a recent work the rule is thus stated as to dealings with persons peculiarly exposed to pressure:² "If a party can prove to the satisfaction of the Court, (1), any circumstances which show that at the time of entering into the transaction he was peculiarly exposed to pressure, and (2), that the terms of the transaction and the conduct of the other party were such as to raise suspicion of unfair dealing; the Court will set aside the transaction unless the other party can prove that it was in fact fair and reasonable."

The term undue influence is generally applied to cases where a contract, conveyance or testament is obtained from a person whose confidence has been abused, or whose will has been overpowered by another's personal ascendancy, or by importunities he was too weak to resist.³ It exists whenever one person has moral power over another and makes an unconscionable use of that power. Equity will annul a contract so obtained.

Confidential relations. Proof by the party complaining that he was made to execute a contract by undue influence is not necessary when a confidential relation existed between the parties, but the presumption then is that undue influence was exerted. The burden is then cast upon the other party to show that the transaction was a righteous one, and the free and voluntary act of the party complaining. There is

¹ *Wooley v. Drew*, 49 Mich. 290; *Moore v. Moore*, 81 Cal. 195. In *Wood v. Abrey*, 3 Madd. 423, it is said: "If it be found that the vendor was in distressed circumstances and that advantage was taken of that distress," a Court of Equity will avoid the contract.

² Potts' *Summary of the Law of Contract*, 230, citing *Nevill v. Snelling*, 15 Ch. D. 679; *Clark v. Malpas*, 4 D. F. & J. 401; *Fry v. Lane*, 40 Ch. D. 312.

³ *Todd v. Grove*, 33 Md. 188; *Tate v. Williamson*, L R. 1 Eq. 528. The leading case is *Huguemin v. Basely*, 14 Vesey, 285.

such a confidential relation between parent and child;⁴ between trustee and *cestui que trust*;⁵ between guardian and ward;⁶ between principal and agent;⁷ between lawyer and client;⁸ between medical attendant and patient;⁹ between religious teacher and disciple.¹⁰ Whether there is such a fiduciary relation between husband and wife is the subject of conflicting decisions.¹¹

In the matter of asking for and obtaining a legacy distinguished from a contract the natural influence of a parent over a child, or of a husband over a wife, etc., may lawfully be exerted so long as the testator understands what he is doing and is a free agent.¹² But a contract with a third person to use influence with the testator is void, because it tends to the use of undue influence.¹³

§ 95. **Voidable, Not Void.** A contract procured by the use of duress or undue influence is not *per se* void, but is voidable at the election of the person constrained by such means, in the same manner as contracts obtained by fraud. • If duress

⁴ Thiede v. Startzman, 113 Md. 278; Reck's Executor v. Reck, 110 Md. 497; Reed v. Reed, 101 Md. 138; Bauer v. Bauer, 82 Md. 241; Bainbridge v. Brown, 18 Ch. D. 188.

⁵ Williams v. Marshall, 4 G. & J. 376; Williams v. Williams, 63 Md. 371.

⁶ Forbes v. Forbes, 5 Gill, 30; Smith v. Davis, 49 Md. 470; Carter v. Tice, 120 Ill. 277.

⁷ Horner v. Bell, 102 Md. 435; Brown v. Mercantile Trust Co., 87 Md. 377; Frush v. Green, 86 Md. 494.

⁸ Merryman v. Euler, 59 Md. 588; Place v. Hayward, 117 N. Y. 487; Liles v. Terry [1895], 2 Q. B. 679.

⁹ Kellogg v. Peddicord, 181 Ill. 22; Mitchell v. Homfray, 8 Q. B. D. 587.

¹¹ Howes v. Bishop [1909], 2 K. B. 390; Bank of Africa v. Cohen [1909], 2 Ch. 129; Ford v. Ford, 103 Pa. 530, hold that there is not. Lewis v. McGrath, 191 Ill. 401; Haack v. Weicken, 118 N. Y. 67, *contra*. See Linnenkemper v. Kempton, 58 Md. 159; Gunther v. Gunther, 59 Md. 560. The fact that a testator bequeathed his property to his mistress is not in itself evidence of undue influence. Saxton v. Krumm, 107 Md. 393.

¹² Griffith v. Diffenderfer, 50 Md. 484; Tyson v. Tyson, 37 Md. 583.

¹³ Debenham v. Ox, 1 Ves. Sr. 276. As to undue influence exerted by a third party to obtain a contract for the benefit of another, see Cobbett v. Brock, 20 Beav. 524; *ante*, § 91, note 2.

was exerted the contract is voidable at law; if undue influence, then in equity. Consequently such contracts may be ratified when the person under compulsion regains freedom of action. "One entitled to repudiate a contract on the ground of duress should, like one who attempts to repudiate a contract on the ground of fraud, act promptly."¹ A promissory note obtained by duress is nevertheless enforceable in the hands of a *bona fide* holder for value.²

¹ Oregon, etc., *R. Co. v. Forrest*, 128 N. Y. 83.

² *Fairbanks v. Snow*, 145 Mass. 153; *Deputy v. Stapleford*, 19 Cal. 302.

CHAPTER IX

UNLAWFUL AGREEMENTS

No valid contract can be made unless its object is one permitted by the law. A contract may be illegal either because expressly prohibited by statute, or by definite rules of the common law, or because it is opposed to the policy of the law.

§ 96. **Contracts in Violation of Statute.** If the statute expressly prohibit a contract it is void, and there is no room for construction. But if the statute merely imposes a penalty upon the doing of an act, or directs that a trade shall only be carried on under certain conditions, or if the penalty is imposed for the protection of the revenue or of the public, then the contract may or may not be illegal. The statute must be examined as a whole to find out whether or not the legislature meant that contracts in breach of it should be void.¹

The following rulings may be mentioned by way of partial illustration of the manner in which contracts apparently in violation of statutes are dealt with by the Courts. Where a statute provides that no person shall engage in a certain business without having paid a tax or license, sales made by one who has not complied with it are nevertheless valid, because the object of the statute is to raise revenue.²

A statute which provides that hawkers and peddlers shall take out licenses before making sales and imposes a fine in general terms for its violation does not operate to prevent an

¹ *Harris v. Runnels*, 12 How. 79; *Lester v. Bank*, 33 Md. 564; *Ruckman v. Bergholz*, 37 N. J. L. 437.

² *Larned v. Andrews*, 106 Mass. 435.

unlicensed peddler from recovering the price of goods sold, since the object of the statute is to raise revenue.³

It is sometimes said that if the penalty for carrying on a business without a license is imposed once for all, it will be construed as a revenue statute merely, and not as designed to make illegal contracts by a person acting without a license; but that if the penalty is imposed for each transaction by an unlicensed person, it will be considered that the object of the law was to prohibit each transaction. But this is not a rule of universal application. Notwithstanding the imposition of a penalty for each offense, the statute may still have designed to raise revenue by the penalty and not to have made the contract illegal. Where a statute directed that real estate brokers should pay for a license and imposed a fine for each transaction made by a broker without a license, it was held that the object of the statute was to raise revenue, and that a broker who had acted without a license could recover compensation for his services.⁴

If the object of the legislature in requiring certain persons to be licensed or certain goods to be inspected before sale is to protect the public or to regulate and supervise a certain business, then a transaction in violation of the statute is illegal. A pharmacist, or medical man, or dentist, for instance, who acts without a license, can recover no compensation for his services. When a statute provides that fertilizers shall not be sold without certain labels or without inspection, a sale in violation of the statute is illegal.⁵

³ *Banks v. McCosker*, 82 Md. 518. An unlicensed innkeeper cannot recover for board and lodging, since the purpose of the statute is to protect the public. *Randall v. Tull*, 89 Me. 443; 38 L. R. A. 143. So there can be no recovery for the services of an unlicensed stallion. *Smith v. Robertson*, 106 Ky. 472; 45 L. R. A. 510.

⁴ *Coates v. Locust Point Co.*, 102 Md. 291; *Walker v. Baldwin*, 103 Md. 352. But see *Douthart v. Congdon*, 197 Ill. 355; *Johnson v. Hulings*, 103 Pa. 498; *Seitz v. Brewers Co.*, 141 U. S. 510, where a different conclusion was reached in the construction of somewhat similar statutes.

⁵ *Wood v. Armstrong*, 54 Ala. 150; *McConnell v. Kitchens*, 20 S. C. 430.

§ 97. **Gaming and Wagering Contracts.** Statutes in most of the States prohibit certain kinds of gambling transactions. It is sometimes provided, as was done by 16 Car. II, ch. 7, that if any person by playing at any game shall lose money or property "upon ticket or credit," he shall not be compellable to pay the same. Other statutes are similar to 9 Anne, ch. 14, which enacted that any security given for money won by playing cards or any other game, or by betting on the hands of players, or for repaying money knowingly lent for such gaming or betting, at the time and place of such play, "shall be utterly void, frustrate and of none effect." In some cases the statute provides that money lost and paid may be recovered. Under the statute of 9 Anne, it was held that a promissory note given for a gambling debt was void even in the hands of a holder for value without notice.¹ But the Negotiable Instruments Act, in force in some States, provides that a *bona fide* holder takes free from the defect of illegal consideration.

Money lent to me for the express purpose of being used for gambling cannot be recovered.² But where a person loses a wager and requests another to pay it, which is done, or where one lends money for that purpose, it may be recovered unless such transaction is expressly prohibited by statute.³

When the money wagered by the parties is put in the hands of a stakeholder, either party may notify him not to pay it over, and it is then his duty to return it. This notice may be given even after the happening of the event upon which

¹ *Emerson v. Townsend*, 73 Md. 234; *Gough v. Pratt*, 9 Md. 526. Cf. *Harper v. Young*, 112 Pa. 419.

² *Tyler v. Carlisle*, 79 Me. 310; *Raymond v. Leavitt*, 46 Mich. 447. But if not so used the money may be recovered. *Tyler v. Carlisle*, *supra*. Mere knowledge on the part of the lender that the money will be so used does not prevent recovery when he is not a confederate. *Waugh v. Beck*, 114 Pa. 422.

³ *Read v. Anderson*, 13 Q. B. D. 779; *Pyke v. Lyster*, 8 Ch. D. 754; *Dewey on Wagers*, 329. See, *Carney v. Plummer* [1897], 1 Q. B. 634; *Armstrong v. Am.*, etc., Bank, 133 U. S. 433; *Cathran v. Ellis*, 125 Ill. 496.

the wager depended.⁴ The obligation of the stakeholder to return the stake upon demand "does not arise out of any gaming agreement, but out of the revocation of an authority given in furtherance of a gaming agreement."⁵

The general rule in America, independently of any statute, is that a wagering contract is illegal and void as being against public policy.

But a contract for the sale of stock or of goods to be delivered at a future day is valid, although at the time of making the contract the vendor did not have the property in his possession, nor had contracted to buy it, nor had any expectation of becoming possessed of it otherwise than by going into the market and there buying it and although a margin be deposited as security.⁶

Such contract, however, is only valid when the parties really intend that the goods are to be delivered by the seller and the price to be paid by the buyer; and if, under the guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction is a wager and is null and void.⁷ Both parties must have the illegal intent, to settle differences.⁸

⁴ *Fisher v. Hildreth*, 117 Mass. 558; *McAllister v. Hoffman*, 16 S. & R. 147; *McDonough v. Webster*, 68 Me. 530; *Burge v. Ashley & Smith* [1900], 1 Q. B. 744.

⁵ *Diggle v. Higgs*, 2 Ex. D. 422.

⁶ *Appleman v. Fisher*, 34 Md. 551; *Ridgely v. Riggs*, 4 H. & J. 358; *Irwin v. Williar*, 110 U. S. 508; *Hatch v. Douglas*, 48 Conn. 116; *Cole v. Milmins*, 88 Ill. 349. In some States even this contract is prohibited by statute.

⁷ *Irwin v. Williar*, 110 U. S. 508; *White v. Barber*, 123 U. S. 322; *Hoogewerff v. Flack*, 101 Md. 371; *Billingslea v. Smith*, 77 Md. 524; *Stewart v. Schall*, 65 Md. 307; *Shaw v. Clark*, 49 Mich. 384; *Kingsbury v. Kirwan*, 77 N. Y. 612. A promissory note based on such a transaction is good in the hands of a *bona fide* holder. *Crawford v. Spencer*, 92 Mo. 498.

⁸ *MacDonald v. Gessler*, 208 Pa. 177; *Donovan v. Daiber*, 124 Mich. 49.

Hence the contracts called "puts" and "calls," in the language of the Stock Exchanges, do not on their face disclose illegal transactions, and may be valid.⁹ Parol evidence in this, as in other cases, is admissible to show the real nature of the transaction.¹⁰

A broker who negotiates a wagering contract, suing not on the contract itself, but for services performed and money advanced for defendant at his request, is entitled to recover.¹¹ But when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction.¹²

A party to a gambling transaction in shares of stock who has placed the sum wagered in the possession of the other party as margins, is not entitled, upon repudiating the transaction, to the aid of a Court of Equity to recover back the money so paid.¹³

§ 98. **Contracts Made in Breach of the Sunday Laws.** In many of the States there are statutes which prohibit the making of contracts generally, or some kinds of contracts, on Sunday. At common law, all contracts made on Sunday are valid.¹ Consequently, in order to ascertain the validity of any

⁹ *Bigelow v. Benedict*, 70 N. Y. 202; *Story v. Solomon*, 71 N. Y. 420.

¹⁰ *Clark v. Foss*, 7 Biss. 540.

¹¹ *Roundtree v. Smith*, 108 U. S. 269; *Cover v. Smith*, 82 Md. 586.

¹² *Irwin v. Williar*, 110 U. S. 510; *Stewart v. Schall*, 65 Md. 308; *Tantum v. Arnold*, 42 N. J. Eq. 60.

¹³ *Baxter v. Deneen*, 98 Md. 181.

¹ *Comyns v. Boyer*, Cro. Eliz. 485; *Richmond v. Moore*, 107 Ill. 429; *Hellams v. Abercrombie*, 15 S. C. 110. In *Rodman v. Robinson*, 134 N. C. 511, the Court said: "It is incorrect to say that Christianity is a part of the common law of the land. * * * Even if Christianity could be deemed the basis of our government, its own organic law must be found in the New Testament, and there we shall look in vain for any requirement to observe Sunday, or indeed any day. * * * There seems to have been no statute against working on Sunday until the Statute of 29 Car. II, c. 7 (1678)." In this case it was held that a contract to convey land made on Sunday was valid, because not expressly prohibited by the statute of that State.

particular contract made on Sunday, it is necessary to interpret the statute of the State where made. For, unless it is expressly prohibited, a contract made on Sunday is valid. These Sunday laws are held to be a constitutional exercise of the police power.²

Money received by an agent for sales made on Sunday in violation of law cannot be retained by him as against his principal.³ The acknowledgment on Sunday of a debt barred by the statute of limitations is admissible in evidence.⁴

Judicial acts performed on Sunday are generally void according to the maxim, *Dies Dominicus non est juridicus*.⁵

§ 99. **Contracts in Aid of a Crime or Tort.** Agreements of this character are illegal at common law, apart from the question of public policy, since they involve a violation of definite rules of law. Some of the contracts invalid for this reason are:

Agreements to commit a crime, or do a civil wrong to third persons. No action lies upon any contract made with a public enemy during hostilities.¹ Secret agreements between a debtor and a creditor to give the latter a preference, when there is a general composition with creditors, are illegal.²

A contract which promotes the perpetration of a fraud upon a third person or upon the public generally is illegal.³ Where a man conveys property to one upon the secret understanding that after the grantor shall have settled with his creditors, the property will be reconveyed, the contract is

² *Judefind v. State*, 78 Md. 510.

³ *Haacke v. Knights of Liberty*, 76 Md. 429.

⁴ *Thomas v. Hunter*, 29 Md. 212.

⁵ *Ecker v. First Nat. Bank*, 64 Md. 292.

¹ *Montgomery v. U. S.*, 15 Wall. 395; *Dorsey v. Kyle*, 30 Md. 512.

² *Clark v. White*, 12 Peters, 178; *Cheveront v. Textor*, 53 Md. 305.

³ *Moore v. Horsley*, 156 Ill. 36; *Materne v. Horwitz*, 101 N. Y. 469.

In the latter case it was held that the price of "sardines" caught and prepared in New England could not be recovered, because the boxes had labels stating that they were of French origin, designed to deceive the public.

illegal and the grantor cannot enforce a reconveyance.⁴ Where a party advanced money to enable a person to obtain in his own name a judgment on a claim properly belonging to a corporation, he cannot recover his advances.⁵

An agreement under which a man writes a letter recommending the work of a builder, knowing that it will be used as an inducement to the public to deal with him, when the writer of the letter believes the statements it contains to be false, is an illegal contract.⁶

§ 100. **Agreements Which Are Contrary to Good Morals.** A contract, the consideration of which is present or future illicit intercourse between the sexes, is *contra bonos mores*, and void.¹ "The law will not permit a woman to make her virtue an article of merchandise."² No action lies on any contract of which this is the consideration.³ But if the contract has been executed, property acquired under it cannot be recovered back, upon the principle of *in pari delicto potior est conditio defendentis*.⁴ When the promise is made upon the consideration of past illicit cohabitation, it is not upon an illegal consideration, but it is regarded as gratuitous and is binding if under seal.⁵ So a deed by a father for the benefit of his illegitimate child, with remainder to the mother of the child, is valid.⁶

§ 101. **Agreements Which Are Contrary to Public Policy.** It was not until the early part of the nineteenth century that the Courts asserted the power to declare void a contract

⁴ *Roman v. Mali*, 42 Md. 512. In this case the conveyance was made by a client to his attorney, but it was held that that circumstance did not prevent the application of the rule, *in pari delicto*. A different view as to the effect of the fiduciary relation in such case was taken in *Herrick v. Lynch*, 150 Ill. 283.

⁵ *Davis v. Gemmell*, 73 Md. 530.

⁶ *Harrison v. McLaughlin Bros.*, 108 Md. 428.

¹ *De Sobry v. De Laistre*, 2 H. & J. 191.

² *Cusack v. White*, 2 Mills, Const. R. 284.

³ *Drennan v. Douglas*, 102 Ill. 341.

⁴ *Hill v. Freeman*, 73 Ala. 200.

⁵ *In Re Vallance*, 26 Ch. D. 353.

⁶ *Conley v. Nailor*, 118 U. S. 127.

merely because in the opinion of the Court it ~~had a tendency~~ to injure the public. Such contracts were pronounced to be against the policy of the law and therefore void, and the policy of the law means, not what the Legislature has declared to be the policy of the State, but what the Judges deem to be prejudicial.

Sir W. Anson says that, although the history of this doctrine is obscure, it is most likely that agreements which tended to restrain trade or to promote litigation were the first to elicit the principle that the Courts would look to the interests of the public in giving efficacy to contracts. But Sir Frederick Pollock maintains that the doctrine of public policy in its modern form arose from the efforts of the Court to discourage action on wagers. "Thus a wager on the future amount of hop duty was held void because it might expose to all the world the amount of the public revenue, and Parliament was the only proper place for the discussion of such matters."¹

The extension of this judicial power which restricts the freedom of contract has met with protests and restrictions. Jessel, M. R., said: "If there is one thing which more than another public policy requires, it is that men of full age and of competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."² In a recent case,³ Lord Halsbury denied that any Court can create a new head of public policy and he quoted Baron Parke, who said:⁴ "To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is the province of the statesman and not the lawyer to discuss, and of the Legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the Judge to expound the

¹ Pollock, *Contracts*, 313.

² *Printing, etc., Co. v. Sampson*, L. R. 19 Eq. 462. See also, *Trust Estate of Woods*, 52 Md. 536.

³ *Janson v. Driefontein Consol. Mines* [1902], App. Cas. 484.

⁴ In *Egerton v. Lord Brownlow*, 4 H. L. C. 1.

law only; the written from the statutes, the unwritten or common law from the decisions of our predecessors, and of our existing Courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from these by sound reason and just inference; not to speculate upon what is the best in his opinion for the advantage of the community."

It is often said with truth that the right of private contract is no small part of the liberty of the citizen.⁵ But, on the other hand, as Dicey asks, shall a man be free to make a contract which will deprive him of his freedom? There can be no doubt that in the great majority of cases the exercise of this power by the Courts to declare contracts to be void because against public policy has served the cause of justice and has been "founded upon the prevailing and just opinions of the public good." It has sometimes protected the public or portions of it from combinations or conspiracies against their economic welfare. It has sometimes protected individuals from their own lack of judgment or from the rapacity that extorted from them unconscionable bargains. There must needs be more or less uncertainty as to the kind of contracts that will be placed under a taboo. This is partly because what is especially injurious to a community at one period of its development may not be prejudicial at another. Only some twenty years ago, a Federal Court decided that if a common carrier charges only fair rates to the public generally, it may charge something less to others who make large shipments.⁶ This decision was not correct when it was made, but at that time the evil of rebates and favoritism in fostering monopolies and their injurious effect on the public at large was not so obvious and prevalent as it afterwards became.

Another element of uncertainty in the application of this principle is that the popular, and consequently the judicial view of what is right and wrong, fair and unfair, changes and varies in a silent and unconscious growth. What one genera-

⁵ 176 U. S. at p. 505.

⁶ *Menach v. Ward*, 27 Fed. Rep. 529.

tion deems fair and right is in the *mores* of age, and another generation may deem it wrong, and that makes it wrong.⁷

It is laid down by Anson that the policy of the law has on certain subjects been worked into a set of tolerably definite rules, "but no Court has any longer the power to extend its application."⁸ Pollock says, that the general tendency of modern ideas is no doubt against the continuance of jurisdiction in Courts of justice to hold transactions or dispositions of property void simply because in the judgment of the Court it is against the public good that they should be enforced when the grounds of that judgment are novel. He adds, however, that there is a good deal of modern and even recent authority which makes it difficult to deny the continued existence of that power.⁹

It does not seem that there can be any doubt on this subject in America. Our Courts frequently declare new kinds of contracts to be void because against public policy.

One may well ask this question:—If the Courts had the power in the nineteenth century to declare a contract to be void because against public policy, how and why have they lost that power in the twentieth century?

Some of the contracts which have been adjudged to be illegal because against public policy are classified in the following sections.

§ 102. **Interference With the Executive or Legislative Functions of Government.** A contract by which a commission is to be paid for inducing, by the exercise of personal influence, a government official to purchase supplies from a particular party is void.¹ Even when the contract is for the exercise of influence with a foreign government by an officer of that gov-

⁷ "The *mores* can make anything right and prevent condemnation of anything." W. G. Sumner, *Folkways*, ch. 15.

⁸ *Contracts*, 10th ed. 213.

⁹ *Contracts*, m. p. 313. See the observations on this subject of Vaughan Williams, L. J., in *Wilson v. Carnley* [1908], 1 K. B. 737.

¹ *Tool Co. v. Norris*, 2 Wallace, 45. In this case the Court said: "Public offices are trusts held solely for the public good."

ernment, it will not be enforced in our Courts.² This rule, however, does not prohibit the owner of goods from employing an agent to effect a sale to the government, when no corrupt influence is to be used, and when it is a fair commercial transaction, the agent not being employed to procure a contract as a matter of personal favor.³

A contract which affects the competition for public printing is void.⁴ And so is also an agreement by a candidate for public office to pay for the support of a newspaper.⁵

A contract which has a "tendency to prevent citizens from serving in the army and navy" is against public policy.⁶

All contracts for a contingent compensation for obtaining legislation, or to use personal or any secret influence on legislation are against public policy and void.⁷ "Legislators should act from high considerations of public duty." An agreement for lobbying a bill is void.⁸ But persons interested in legislation may urge their claims openly, and a contract for such service is not illegal.

A contract whereby in consideration of A.'s procuring B.'s appointment as special counsel in certain causes against the Government and aiding him in managing them, B. agrees that he will pay A. one-half of the fee which he may receive from the government, is contrary to public policy and void.⁹

An agreement by a candidate to share the emoluments of a public office in consideration of aid in securing his election, is void.¹⁰

² *Oscanyan v. Arms Co.*, 103 U. S. 261.

³ *Lyon v. Mitchell*, 36 N. Y. 235; *Mills v. Mills*, 40 N. Y. 545; *Wimpenny v. French*, 18 Ohio St. 475.

⁴ *Brooks v. Cooper*, 50 N. J. Eq. 761.

⁵ *Livingston v. Page*, 74 Vt. 356.

⁶ *Potts' Summary*, 383, citing *Beard v. Hall* [1908], 1 Ch. 383.

⁷ *Marshall v. Balto. & Ohio R. Co.*, 16 Howard, 314.

⁸ *Trist v. Child*, 21 Wallace, 441. See also, *Howard v. Church*, 18 Md. 451.

⁹ *Meguire v. Corwine*, 101 U. S. 108.

¹⁰ *Hunter v. Nolf*, 71 Pa. 282; *Martin v. Wade*, 37 Cal. 168.

The salary of a public office cannot be assigned unless already earned and due.¹¹ A contract to pay a public officer more than he is by law entitled to charge is void.¹²

"Any contract to appoint one to a public office, or involving the sale of a public or quasi-public office, or to do anything in consideration of the promisee's exchanging offices with, or securing an office for the promisor, or recommending him for such office, or resigning any office, is void."¹³

§ 103. **Interference with the Course of Justice.**

1. *Agreements which tend to obstruct the administration of criminal law.* Any contract whose object is to compound a felony, or stifle a prosecution or compromise a criminal proceeding, is held to be void upon the principle that the public welfare demands the punishment of offenders; that a man who knows that a crime has been committed should not be allowed to make it a source of personal profit, and that the State relies upon those having knowledge of a crime to aid the prosecution.¹ Compounding a crime without leave of the Court is made a criminal offense by the Statute of 18 Eliz. c. 5, sec. 3. In some States prosecutions for assault and battery or for a misdemeanor may be compromised.²

¹¹ *Field v. Chipney*, 79 Ky. 260; *Stephenson v. Walden*, 24 Iowa, 84; *Brantly*, Per. Prop. § 271. "When the law prohibits a municipality from changing the compensation of an officer during his term of office, he will not be estopped, by signing an agreement to accept a less amount in consideration of being retained in office and by accepting the amount so stipulated, from recovering the balance of his legal salary." *Nelson v. City of Superior*, 109 Wis. 618.

¹² *Carroll v. Barber*, 2 H. & G. 57.

¹³ *Greenhood on Public Policy*, 338.

¹ *Collins v. Blantern*, 1 Smith's Ldg Cases, 369, note; *Pearce v. Wilson*, 111 Pa. 14; *Henderson v. Palmer*, 71 Ill. 579. In *Williams v. Bayley*, L. R. 1 H. L. 220, Lord Westbury said: "You shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself."

² Whether an agreement to compromise a prosecution for a misdemeanor, for which the prosecutor may also institute a civil suit, is valid or not, is the subject of conflicting decision in America, but most of them hold that unless authorized by statute the agreement

A contract to pay an attorney a contingent fee to procure the settlement of a criminal charge is void.³ So, after conviction, a contract to pay money to induce the prosecutor to ask the Court to mitigate the punishment is void.⁴

A mortgage given by a bank officer to suppress a prosecution against him for embezzlement cannot be enforced.⁵ So where the son of the mortgagor having been guilty of embezzlement, the mortgage was executed for the amount embezzled and in consideration of an agreement by the mortgagee that there should be no prosecution, it was also held to be unenforceable.⁶ But other cases consider that a note or security given for the amount stolen is valid, although the accompanying promise not to prosecute is void.⁷ And some cases hold that when a man's signature has been forged, a note or security given to him or to another in consideration of the surrender of the forgery is enforceable.⁸

Where the consideration of the promise was that the promisee would obtain, without the use of improper means, a *nolle prosequi* from the Governor upon a pending indictment against certain parties, the contract was held to be void as against public policy.⁹ "Where a person interposes his interest and good offices to procure a pardon it ought to be done gratuitously, and not for money." So a promise by a

is void. See Greenhood on Public Policy, 455. The English rule is, that if the offense is not of a public nature the compromise is valid. *Keir v. Leeman*, 9 Q. B. 395; *Windhill Local Board v. Vint*, 45 Ch. D. 351. The Md. Code, Art. 10, sec. 21, authorizes the compromise of a prosecution for assault and battery.

³ *Ormerod v. Dearman*, 100 Pa. 561. But money paid for compounding, etc., is not recoverable. *Haynes v. Rudd*, 102 N. Y. 372; *Gotwalt v. Neal*, 25 Md. 434.

⁴ *Buck v. First Nat. Bank*, 27 Mich. 293.

⁵ *Pearce v. Wilson*, 111 Pa. 14; *Henderson v. Palmer*, 71 Ill. 579.

⁶ *Peed v. McKee*, 42 Iowa, 689; *Foley v. Greene*, 14 R. I. 618.

⁷ *Bibb v. Hitchcock*, 49 Ala. 468; *Catlin v. Heston*, 9 Wis. 476. But see *Taylor v. Jacques*, 106 Mass. 291. A note appended to *Bankhead v. Shed*, 16 L. R. A. (N. S.) 971, collects cases relating to the effect of an agreement to stifle prosecution upon contract to pay existing indebtedness, or the value of property or money, feloniously obtained.

⁸ *Chittenham Co. v. Cook*, 44 Mo. 29; *Swope v. Ins. Co.*, 93 Pa. 186.

⁹ *Willey v. Collier*, 7 Md. 273.

convict's sister to pay a sum of money to one who undertakes to secure a commutation of the punishment, is void.¹⁰ But the doctrine of other cases is that a contract to pay a sum of money for services in securing a pardon for the promisor by the use of fair means is valid.¹¹

It is generally held in this country that a contract to indemnify a person who becomes bail for one accused of a crime is not against public policy.¹² But the rule in England is that such a contract is void, because the surety then has no motive to produce the accused or see that the condition of the recognizance is performed.¹³

2. *Agreements tending to pervert the course of civil justice—Champerty and maintenance.* Maintenance exists when a party "improperly and for the purpose of stirring up litigation or strife, encourages others either to bring actions or make defences which they have no right to make."¹⁴ Champerty is "maintenance aggravated by an agreement to have part of the thing in dispute."

"All our cases of maintenance and champerty," said Lord Abinger,¹⁵ "are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce * * * It seems to me that it would be strongly against public policy that in such a case persons who have no interest whatever in the action and who cannot be affected by the verdict in it, or made liable to pay costs, should be allowed to assist another person in maintaining it against the plaintiffs as the defendant has done."

¹⁰ *Kribben v. Haycraft*, 26 Mo. 396; *O'Reilly v. Clearly*, 8 Mo. Ap. 186.

¹¹ *Moyer v. Cautieny*, 41 Minn. 242.

¹² *Moloney v. Nelson*, 158 N. Y. 351; 12 App. Div. N. Y. 548; *Stevens v. Hay*, 61 Ill. 399; *Carr v. Davis*, 64 W. Va. 522; 20 L. R. A. (N. S.) 58. Cf. *U. S. v. Simmons*, 47 Fed. 575.

¹³ *Herman v. Jenchner*, 15 Q. B. D. 561; *Consol. Exploration Co. v. Musgrave* [1900], 1 Ch. 37.

¹⁴ *Findon v. Parker*, 11 M. & Welsby, 682. See *Thompson v. Reynolds*, 73 Ill. 11.

¹⁵ In *Prosser v. Edmunds*, 1 Y. & C. 481, quoted in *Alabaster v. Harness* [1895], 1 Q. B. 339.

"If A. encourages B. to bring an action against C. in the subject-matter of which A. and B. have a common interest, A. does not act improperly and is not guilty of maintenance. But if A. has no common interest with B. in the subject-matter, then *prima facie* he acts improperly and is guilty of maintenance, unless he can show that his interference in the litigation between B. and C. is justified on certain grounds recognized by law, the chief of which are, (1) that B. was a poor man whom he assisted out of pure charity; (2) that B. was his master or servant; (3) that B. was his tenant; (4) that B. was a near relation."¹⁶

According to the weight of authority, a contract by an attorney to prosecute a claim for a contingent fee is valid.¹⁷ When, however, the attorney agrees to advance the funds for carrying on the litigation or pay the costs thereof, for a share of the judgment, the contract is champertous and void.¹⁸ But that fact does not affect the right of the plaintiff to recover.¹⁹ When an agreement of this sort has been made and a part of the judgment has been assigned to the attorney, yet the plaintiff may execute a valid release of the whole.²⁰

In New York the common law doctrine relating to champerty and maintenance no longer exists and the subject is regulated by the Code of civil procedure. This prohibits an attorney from buying a claim for the purpose of bringing an

¹⁶ Potts' Summary of the Law of Contract, citing *Findon v. Parker*, 11 M. & W. 682; *Harris v. Brisco*, 17 Q. B. D. 504; *Alabaster v. Harness* [1895], 1 Q. B. 339; *Sprye v. Porter*, 7 E. & B. 58. See also, *Bradlaugh v. Newdegate*, 11 Q. B. D. 1; *British Cash, etc., v. Lamson Store Co.* [1908], 1 K. B. 1006.

¹⁷ *Taylor v. Bemis*, 110 U. S. 42; *McPherson v. Cox*, 96 U. S. 404; *Stanton v. Embrey*, 93 U. S. 548; *Wright v. Tibbits*, 91 U. S. 252; *Howard v. Carpenter*, 22 Md. 26; *Cain v. Warford*, 33 Md. 36; *Fowler v. Callan*, 102 N. Y. 307; *Geer v. Frank*, 179 Ill. 370.

¹⁸ *Boardman v. Thompson*, 25 Iowa, 487; *Coughlin v. R. R. Co.*, 71 N. Y. 448. But this contract is held to be valid in some States. *Richardson v. Rowland*, 40 Conn. 565; *Bentinck v. Franklin*, 38 Tex. 458.

The client is not *in pari delicto* with the attorney and may ask to have the champertous contract set aside. *Gargano v. Pope*, 184 Mass. 571.

¹⁹ *Burnes v. Scott*, 117 U. S. 589.

²⁰ *Atchison, etc., Co. v. Johnson*, 29 Kans. 218.

action, but allows an attorney to agree upon his compensation, his agreement may be contingent upon circumstances and payable out of the proceeds of the litigation. But he shall not give anything in consideration of getting a claim in his hands.²¹

3. *Agreements to refer to arbitration.* A stipulation to submit an existing controversy to arbitration is valid and enforceable. But agreements in advance to refer future controversies between the parties to arbitration are not binding so as to oust the courts of jurisdiction, and a right which accrues may be enforced by action.²²

A contract "that the parties shall not avail themselves of their rights to an appeal to the Courts for the settlement of their controversies, but shall submit them to private arbitration will not be enforced because it is such an utter abnegation of one's legal rights as should not be permitted. But it is allowable to the parties to make such agreements, in reference to preliminary and incidental matters of dispute, so long as they retain the right to appeal to the Courts for the determination of any substantive question of liability."²³

²¹ Matter of Fitzsimmons, 174 N. Y. 21.

²² *Contee v. Dawson*, 2 Bland, 264, note (c); *Allegre v. Md. Ins. Co.*, 6 H. & J. 408; *White v. Middlesex R. Co.*, 135 Mass. 210; *Dela-ware, etc., Co. v. Penn. Coal Co.*, 50 N. Y. 259; *Dugan v. Thomas*, 79 Me. 221; *Pepin v. Société St. Jean Baptiste*, 23 R. I. 81; *Kinney v. Relief Assn.*, 35 W. Va. 385. In *Scott v. Avery*, 8 Exch. 499, Maule, J., said: "There is no decision which prevents two parties from agreeing that a sum of money shall be payable on a contingency. But they cannot legally agree that when it is payable, no action shall be maintained for it." The provision in the by-laws of an association or benefit society, that a member shall submit his claim to a tribunal within the order before resorting to the Courts, is generally held to be valid. *Donnelly v. Supreme Council*, 106 Md. 425; *McComas & Wells Council v. Littleton*, 100 Md. 416; *Camp No. 6 v. Arrington*, 107 Md. 319; *Smith v. Ocean Castle*, 59 N. J. L. 198. The conduct of the society may be such as to estop it from relying on such provision. *Dague v. Grand Lodge*, 111 Md. 95.

²³ *Dailey v. Building Assn.*, 178 Mass. 13; *Miles v. Schmidt*, 168 Mass. 339. In *Mittenthal v. Mascagni*, 183 Mass. 19, a contract made in Italy by the composer Mascagni relating to his direction in the United States of concerts for a manager provided that, "the present

If an arbitrator is named in the agreement it is generally held that an award by him is a condition precedent to a right of action.²⁴ A provision in a policy of fire insurance that in case of a loss and a difference between the parties touching the same, the matter should, at the request of either party, be referred to arbitration, is not a bar to an action on the policy, unless it be also provided that no action shall be brought before the award.²⁵ The Court said in this case: "A provision in a contract for the payment of money upon a contingency that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then * * * the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent; and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract."²⁶

contract, its form and substance, is regulated by the Italian laws, by will of the parties concerned, and according to article 9 of the Italian Civil Code. Whatever difference or question may arise between the parties, including the agent, will be acted on by the civil authorities of Florence, Italy." It was held that this limitation of suits under the contract to the Courts of Florence is valid and a defense to an action on the contract in Massachusetts. The Court said that the contract is not "so improvident and unreasonable, such an abnegation of legal rights, that the government for the protection of mankind will refuse to recognize it, even when made in a foreign country by subjects or citizens of that country."

²⁴ *Commercial, etc., Co. v. Hocking*, 115 Pa. 407; *Holmes v. Richet*, 56 Cal. 307; *Wood v. Hartshorn*, 100 Mass. 117.

²⁵ *Hamilton v. Home Ins. Co.*, 137 U. S. 370.

²⁶ If the arbitrators fail to agree, without the fault of the plaintiff, he may sue on the policy without an appraisal of the amount of the loss. *Connecticut F. Ins. Co. v. Cohen*, 97 Md. 294; *Home Ins. Co. v. Schiff's Sons*, 103 Md. 648.

4. *Agreements not to rely on statute of limitations.* In every system of legislation there are statutes of prescription, of limitations, which provide that unless a right of action or a claim to property be exercised within a designated time, it shall be deemed extinguished. These laws are called statutes of repose which give security and stability to property and personal rights. They are vital to the welfare of society and do not depend wholly on the presumption of satisfaction from the lapse of time.²⁷ The purpose of such legislation is only partly to punish the one party for his neglect and delay in asserting his rights and to benefit the other party by protecting him from stale demands, or in regard to matters concerning which the evidence may be lost. Another object, and the chief motive of these statutes, is to put an end to litigation, to render property and other rights more certain, to maintain the peace of society by erecting a barrier against vexatious suits.

These reasons lead to the conclusion that a contract by which a party agrees in advance not to plead or rely on the statute of limitations is against public policy and void.²⁸ It is accordingly held in some cases that an agreement made before the statute begins to run not to rely on it is invalid.²⁹ But other cases take what would seem to be the erroneous view, that the statute is only for the benefit of individuals, and therefore may be waived in advance.³⁰

²⁷ *Shepherd v. Thompson*, 122 U. S. 231; *Wood v. Carpenter*, 101 U. S. 135; *Bell v. Morrison*, 1 Peters, 351; *Hawkins v. Chapman*, 36 Md. 100; *Hall v. Claggett*, 48 Md. 223.

²⁸ *Giorgi (op. cit.)*, iii, 325, quotes Bartolus as saying with his sturdy good sense: *Ego dico quod usucapio est introducta propter bonum publicum principaliter; ergo per pactum remitti non potest.*

²⁹ *Shapley v. Abbott*, 42 N. Y. 443; *Nunn v. Edmondston*, 9 Tex. Civ. App. 562; *Crane v. French*, 38 Miss. 503; *Trask v. Weeks*, 81 Me. 325. *Cf. Hodgdon v. Chase*, 29 Me. 47; *Andreas v. Redfield*, 98 U. S. 225; *Schroeder v. Young*, 161 U. S. 334.

³⁰ *Quick v. Corliss*, 39 N. J. L. 11; *State Trust Co. v. Sheldon*, 68 Vt. 259. *Cf. Bridges v. Stephens*, 132 Mo. 524. The statute runs against the promise not to plead it. *Cameron v. Cameron*, 95 Ala. 344; *Kellogg v. Dickinson*, 147 Mass. 432; 1 L. R. A. 346.

The objections to the validity of such an agreement when made by way of an anticipatory renunciation do not apply to a promise made after the statute has begun to run. A promise by a debtor not to plead the statute made in consideration of a forbearance to sue or otherwise, is valid, and he is then estopped to rely on it.³¹ An agreement by the parties as to the time within which suit may be brought on the contract is held by most cases to be valid.³²

§ 104. **Interference With the Marriage Relation.** The policy of the law is to encourage marriage and to discourage any interference with the freedom of choice. Therefore contracts in general restraint of marriage are void.¹ In an old case the defendant signed this agreement under seal: "I do hereby promise Mrs. Catherine Lowe that I will not marry any person besides herself. If I do I agree to pay to the said Catherine Lowe £1,000 within three months after I shall marry anybody else." Ten years afterwards the defendant married somebody else, and Catherine brought suit. It was held that this was not a contract to marry the plaintiff, but was in general restraint of the defendant's marriage and void.²

³¹ Wells-Fargo Co. v. Enright, 127 Cal. 669; 49 L. R. A. 647. Cf. Armstrong v. Levan, 109 Pa. 177; Ilsley v. Jewett, 44 Mass. 439. It is held in Quick v. Corlies, 39 N. J. L. 11; Steel Co. v. Cochran, 130 Cal. 245, that no consideration is necessary to support the promise. *Contra*: Hodgdon v. Chase, 29 Me. 47; Shapley v. Abbott, 42 N. Y. 443.

³² Barber Asphalt Co. v. Erie, 203 Pa. 121; Riddleberger v. Hartford F. Ins. Co., 7 Wall. 386; Gulf, etc., R. Co. v. Gatewood, 79 Tex. 89; 10 L. R. A. 419. But in Union Central Ins. Co. v. Spinks, 119 Ky. 261; 69 L. R. A. 264, it was held that a provision in a contract providing that an action on it must be brought within a period less than that fixed by the statute of limitations was against public policy and void.

¹ James v. Jellison, 94 Ind. 292; O'Neale v. Ward, 3 H. & McH. 93. *note*; Bostick v. Blades, 59 Md. 233.

² Lowe v. Peers, 4 Burrows, 2225. In King v. King, 63 Ohio, 363; 52 L. R. A. 158, it was held that a contract by which a woman agrees to live with a man and take care of him during his life, and also not to marry during that time in consideration of his promise to provide for her comfortably, is valid. "Although the promise not to marry

A contract whose object or consideration is the bringing about of a marriage is called a marriage brokerage contract. It is held to be illegal because the "natural consequences of such agreements would be to bring about ill-advised and in many cases fraudulent marriages, resulting inevitably in the destruction of the hopes and fortunes of the weaker party, especially of women, and that every temptation to the exercise of undue influence in procuring a marriage should therefore be suppressed."³

In *Hermann v. Charlesworth*,⁴ the defendant was the publisher of the Matrimonial Post and Fashionable Marriage Advertiser. The plaintiff, a woman thirty-three years old, agreed with him that "in consideration of his introducing her to gentlemen with a view to marriage, she would pay him as a special client's fee the sum of £52 of which £47 was to be returned to her after the expiry of nine months in the event of no marriage or engagement taking place within that period." She paid the £52 on September 8, 1903, and also agreed to pay £250 on the day of her marriage to a gentleman introduced to her by the defendant. In January, 1904, she sued to recover back the £52, as money paid for a marriage brokerage contract. The lower Court held that the agreement was valid.⁵ But this ruling was reversed on appeal, and Mathews, L. J., said: "The real nature of such a contract is that it is *nudum pactum*, and the law declares

is in itself a void promise, as against public policy, yet it is but an incident to the main engagement, which is for labor and care; and if that service be fully performed and the recipient fails to perform his engagement during life, the other may maintain an action against his estate on the contract."

³ *Duval v. Wellman*, 124 N. Y. 156, 160. See also, *Johnson v. Hunt*, 81 Ky. 321; *White v. Equitable Assn.*, 76 Ala. 251; *Morrison v. Rogers*, 115 Cal. 252.

⁴ [1905] 2 K. B. 123.

⁵ [1905] 1 K. B. 24. It was there held that the contract is not illegal when it is to introduce different men to a woman, representing that she would marry one of them; but that the contract is illegal when it is "to procure for another in marriage, as husband or wife, a certain specified person"—this latter contract being called "a sort of kidnapping into a state of conjugal servitude," citing *Drury v. Hooke*, 1 Vernon, 412.

that it imports no consideration, and that no rights arise under it. The position where a contract is *nudum pactum* and executory is that while unperformed either party may rescind it. The plaintiff has rescinded the contract, and I do not see why effect should not be given to that rescission. With regard to the sum that the plaintiff seeks to recover, the position of the defendant was that of stakeholder of the whole sum deposited with him. There was an executory contract and no legal consideration, and consequently the plaintiff was entitled to rescind and to recover the money that she paid."

An agreement which contemplates or encourages the future separation of husband and wife is illegal because it tends to interfere with the security of the marital relation; but a contract based on their past or immediate separation is valid.⁶

§ 105. **Interference With the Parental Relation.** The doctrine of the English Courts and those of some of the States is that a parent cannot lawfully deprive himself of the control and custody of his children, and that consequently a contract by which a parent transfers the custody of his child to another and divests himself of his parental duty and power is void because against public policy.¹ It has been held that the mother of an illegitimate child cannot by a contract transferring it create an enforceable obligation, because

⁶ *Storey v. Storey*, 125 Ill. 608; *Clark v. Fosdick*, 118 N. Y. 7; *Walker v. Walker*, 9 Wallace, 743; *Fox v. Davis*, 113 Mass. 255; *Randall v. Randall*, 37 Mich. 563; *Brown v. Brown*, 5 Gill, 249; *Helms v. Franciscus*, 2 Bland, 564. When the promise of a husband to assign life insurance policies to his wife is made in consideration of her promise to separate and live apart, the contract is illegal. *Baum v. Baum*, 109 Wis. 47. A promise to marry upon obtaining a divorce, or when the then spouse dies, is against public policy and void. *Pollock v. Robinson*, 63 Ill. 99; *Noice v. Brown*, 38 N. J. L. 228; *Wilson v. Carnley* [1908], 1 K. B. 729.

¹ *Re Andrews*, L. R. 8 Q. B. 153; *State v. Baldwin*, 5 N. J. Eq. 454; *Wood v. Deaton*, 93 Tex. 247; *Hibbetts v. Barnes*, 78 Miss. 695; 51 L. R. A. 840.

she cannot relieve herself of the duty to bring up the child and of the corresponding right to its possession.²

But the ruling of other Courts is that a contract by the parents, or the surviving parent, transferring the control of their child is valid.³ It would appear that this is the correct view, especially in those States where there are statutes providing for the adoption of children. There are some married people who are poverty-stricken, or, if not, who have more children than they can provide for, and there are others who want to have children and are able to care for them, but who have none. These two classes should be allowed to make valid contracts by which one class cedes parental duties and rights and the other acquires them. When such a contract is made it is generally for the advantage of the child, and that is the consideration of prime importance. Some Courts indeed make the validity of the contract depend upon whether or not it promotes the welfare of the child.⁴ In *Enders v. Enders*,⁵ it is said: "We are clearly of the opinion that the tendency of such contracts between grandparents of good character and ample estate and parents in reduced circumstances, where parental solicitude and affection are not to be extinguished, and where the welfare of the child is intended to be promoted, is neither to the injury of the public nor to good morals."

² *Humphreys v. Polak* [1901], 2 K. B. 385. See *Wallace v. Ruppley*, 103 Ill. 229. *Contra*: *Benge v. Hiatt*, 82 Ky. 661.

³ *State v. Barrett*, 45 N. H. 15; *Hoxsie v. Potter*, 16 R. I. 374; *Com. v. Gilkeson*, 1 Phila. 194; *Green v. Campbell*, 35 W. Va. 698; *Cunningham v. Barnes*, 37 W. Va. 756; *Clark v. Bayer*, 32 Ohio, 299; *Bennett v. Bennett*, 61 Iowa, 199. *Cf.* *People v. Weissenbach*, 60 N. Y. 385; *Legate v. Legate*, 87 Texas, 248 (*contra*: *Wood v. Deaton*, 93 Tex. 247); *Anderson v. Young*, 54 S. C. 388; 44 L. R. A. 277. Under the Georgia Code, a contract relinquishing custody of a child is valid. *Bentley v. Terry*, 59 Geo. 555.

⁴ *Weir v. Marley*, 99 Mo. 484; 6 L. R. A. 673; *Kelsey v. Green*, 69 Conn. 291; 38 L. R. A. 471; *Stringfellow v. Somerville*, 95 Va. 701; 40 L. R. A. 624; *Sheers v. Steen*, — Wis. —; 5 L. R. A. 781. *Cf.* *Van Dyne v. Vreeland*, 11 N. J. Eq. 371.

⁵ 164 Pa. 266; 27 L. R. A. 56.

§ 106. **Unconscionable and Unreasonable Agreements.** In some instances, agreements have been held to be against public policy, because they involved an unnecessary or unreasonable surrender by one party of his legal rights, or a renunciation of the benefit of a statute designed to protect a particular class of persons, or because an unconscionable advantage was taken by one party of the other. A contract by which a man, upon being received into a home for aged men, agrees to assign to the home all the property which he then has, and also all that he may thereafter acquire in any manner, is invalid as to future acquired property, because against public policy.¹

A stipulation in a contract providing that in the event of a breach of any of its provisions, an excessive sum shall be paid as a penalty, is in effect treated as void because unconscionable, although this result has been reached by another method of reasoning.²

A contract by a mortgagor which fetters his equity to redeem the property is void.³ An absolute conveyance by a mortgagor of the mortgaged property to the mortgagee will not extinguish his right of redemption unless it appears that no advantage was taken of the necessities of the mortgagor;⁴ or that the mortgagee paid for the property what it was really worth.⁵

When a statute directs that, although a purchaser of an article on the instalment plan has made a default which under the contract extinguishes his rights, he may nevertheless redeem, a contract which waives this statute is void.⁶ As the statute "rests upon grounds of public policy, it is not in the power of one who may be directly affected by it to contract in advance that it may be disregarded."

¹ *Aged Men's Home v. Pierce*, 100 Md. 520.

² See *post*, Part v. ch. 3.

³ *Dugan v. Mut. Benefit Co.*, 46 Md. 469; *Peugh v. Davis*, 96 U. S. 332; *Conway v. Alexander*, 7 Cranch, 218; *Baughner v. Merryman*, 32 Md. 192; *Waters v. Randall*, 6 Met. 484.

⁴ *Day v. Davis*, 101 Md. 259.

⁵ *Villa v. Rodriguez*, 12 Wallace, 323.

⁶ *Desseau v. Holmes*, 187 Mass. 486.

If a law provides that no misrepresentation in an application for life insurance, if made in good faith, shall avoid the policy, unless it is material to the risk, a contract which waives and renounces the benefit of this statute is void.⁷

And generally when a statute is designed for the protection of a class of persons, an agreement not to bring an action or to rely on a defence given by it, is against public policy.⁸

Whether an agreement to waive the benefit of a homestead exemption law is valid, is the subject of conflicting decisions.⁹ It would seem, however, that since the purpose of these statutes is to prevent money lenders from converting independent farmers into day laborers, such a contract should be deemed against public policy.

A contract to do a useless or foolish thing, of no benefit to the promisee, would probably be held invalid on this ground, such as an agreement to bury with one party a valuable work of art, or an engagement by a man not to cut his hair, etc.

§ 107. **Agreements in Restraint of Trade, or to Raise Prices and Create Monopolies.** This matter is regulated by statutes in several of the States, and so far as interstate commerce is concerned by the Act of Congress passed in 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly called the Sherman anti-trust law. With these statutes and their construction by the Courts, I shall not deal, but will briefly indicate some of the principal rules of the common law on the subject. The law concerning restraint of trade is now in a state of confusion and transition.

Contracts in general and unlimited restraint of trade are void, because they tend to deprive the public of the services of men in the employments in which they may be most useful

⁷ *Fidelity, etc., Co. v. Ficklin*, 74 Md. 173.

⁸ *Equitable, etc., Society v. Clements*, 140 U. S. 226; *Corey v. Griffin*, 181 Mass. 229; *Bosler v. Rheam*, 72 Pa. 54.

⁹ See note to *Batthey v. Barker*, 56 L. R. A. 76.

to the community as well as to themselves, and because they expose the public to the evils of the monopolies.¹

But contracts restraining the exercise of a trade or profession to a particular locality, when founded upon a consideration, are valid.² The restraint, however, must be confined within reasonable bounds. It may be unlimited as to time, but must as a general rule be limited as to space.³ What limitation as to space will be allowed depends upon the facts of each case. It must not be more than sufficient to afford reasonable protection to the party for whose benefit the stipulation is made.⁴

The old rule requiring a limitation as to space is not applicable to modern conditions of manufacture and sale. It is now generally, but not universally, held, that if the good will, patents, etc., of a business which carries on its operations throughout a continent, or the world, are sold, there may be a valid covenant by the seller not to compete anywhere if such restriction is reasonable between the parties and not injurious to the public.⁵ Nordenfelt, the maker of guns, ammunition and explosives, sold his business and patents to a company, and covenanted not to engage in the business of manufacturing such articles, or in any business competing in any way with that carried on by the company. It was held that the restriction as to any business liable to compete with that of the company was wider than was necessary to protect the purchaser and was void, but that the restriction as to the manufacture of guns, explosives, etc., was valid, and was severable from the other.⁶

¹ *Mitchell v. Reynolds*. 1 *Smith's Ldg. Cases*, notes; *Alger v. Thacker*, 19 *Pick.* 51.

² The consideration must be real, but its adequacy will not be examined. *Pittsburg Stove Co. v. Penn. Stove Co.*, 208 *Pa.* 37.

³ *Oregon Co. v. Winsor*, 20 *Wall.* 64; *Smith's Appeal*, 113 *Pa.* 579; *Long v. Towl*, 42 *Mo.* 545; *Guerand v. Daudalet*, 32 *Md.* 561; *Warfield v. Booth*, 33 *Md.* 63; *Nicholson v. Ellis*, 110 *Md.* 322; *Davis v. Burney*, 2 *G. & J.* 382.

⁴ *Diamond Match Co. v. Roeber*, 106 *N. Y.* 473; *Beall v. Chase*, 31 *Mich.* 490.

⁵ *Anchor Elec. Co. v. Hawkes*, 171 *Mass.* 101; 41 *L. R. A.* 189.

⁶ *Nordenfelt v. Maxim-Nordenfelt Co.* [1894], *App. Cas.* 548.

In all cases where the validity of the limitation as to space is to be determined no better test can be applied to the question whether the restraint is reasonable or not "than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive, and if oppressive it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void on the grounds of public policy.⁷

Monopolies and "trusts." Where the purpose of an association is to buy up the property of all corporations and individuals engaged in a certain business, exacting from them a bond conditioned not to compete within certain territory and time, the object is to prevent competition and control prices in an article of necessity, and is void because against public policy.⁸ So, where shares of stock in different companies, and the properties of firms, are conveyed to trustees, who issue trust certificates in lieu thereof, the trustees being empowered to control the corporations and partnerships and to distribute dividends from the whole as a common fund, the combination tends to create a monopoly, to control production as well as prices, and is against public policy.⁹ A corporation formed for the purpose of buying up controlling interests in the stock of all gas companies in order to destroy competition and create a monopoly is formed for an illegal

⁷ Tindal, C. J., in *Horner v. Graves*, 7 Bing. 535, approved and applied in *Mills v. Dunham* [1891], 1 Ch. 576; *Rogers v. Maddocks* [1892], 3 Ch. 346.

⁸ *Richardson v. Buhl*, 77 Mich. 632; 6 L. R. A. 417.

⁹ *State v. Standard Oil Co.*, 49 Ohio, 137; 15 L. R. A. 145. "An agreement between the manufacturers of 85 per cent. of the envelopes of the country and an outside manufacturer providing that the selling price of all envelopes made by them during a term of years should be fixed by a corporate agent of the combination, threatens a monopoly, whereby trade in a useful article may be restrained and its price unreasonably enhanced, and is invalid. *Cohen v. Birlin & Jones Co.*, 166 N. Y. 292. See *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; 46 L. R. A. 255.

purpose, and its acts in furtherance of that purpose are void.¹⁰ A railroad pool, or agreement between competing lines to divide profits, is illegal, and the Courts will not enforce it.¹¹ Corporations cannot combine to form a trust for a monopoly and restraint of trade; there can be no partnership for that purpose of independent corporations, and an action for the dissolution of a corporation lies, if such combination has been made.¹²

A contract by which a corporation chartered to perform the duties of a common carrier, or of a gas company, or any other duties to the public, agrees that it will not perform them, is void.¹³

Where the object of the contract is to limit the supply of a certain article, or to raise prices, it is void.¹⁴ A combination to "corner" the market in an article by buying all of it that is offered, and then making contracts for future delivery, is void, and there can be no recovery for advances made in its furtherance.¹⁵ Defendant, a dealer in coal, contracted with a coal company to take all the coal the latter should send into defendant's State, not exceeding 2,000 tons per month, and the company agreed not to sell coal to other parties in that State. The product of the coal company exceeded that amount, and the object was to enable defendant to control the market. Since it was not a contract to take all the coal mined by the company, and imposed no obligation on the company to deliver any, the agreement was held to be

¹⁰ *People v. Chicago Gas Trust Co.*, 130 Ill. 268.

¹¹ *Tex. Pacific R. Co. v. Southern Pacific Co.*, 41 La. An. 970.

¹² *People v. North River Sugar Ref. Co.*, 121 N. Y. 582.

¹³ *Gibbs v. Balto. Gas Co.*, 130 U. S. 396; *Central Transp. Co. v. Pullman Co.*, 139 U. S. 54.

¹⁴ *Santa Clara, etc., Co. v. Hayes*, 76 Cal. 387. "An agreement by one ice manufacturing company to pay to another party a certain sum annually if he will not operate his ice machine in a certain town for five years is illegal, because it tends to injure the public by stifling competition and creating a monopoly in a necessity of life in a warm climate." *Tuscaloosa Ice Co. v. Williams*, 127 Ala. 121.

¹⁵ *Samuel v. Oliver*, 130 Ill. 73.

void, and no recovery by the company was allowed for coal delivered to defendant under it.¹⁶

When wholesale dealers in certain articles agree together not to sell to retail dealers unless the latter will agree not to sell below certain fixed prices, the combination is illegal, and a retail dealer injured by it has a right of action.¹⁷ But a contract between a manufacturer or wholesale dealer on the one hand and a retail dealer on the other, by which the latter agrees not to sell below a certain price, is generally held to be valid at common law, but is in some States within the statutory prohibition.¹⁸

§ 108. Effect of Illegality upon Contracts.

1. When the contract is severable, there being several promises or several considerations, some of which are illegal, those which are not tainted with illegality may be enforced.¹

If there be a promise to do two things, one of which is illegal, the latter may be disregarded and the promise to do the former enforced.² When an innkeeper not licensed to sell liquor does sell it, and also supplies food and lodging to the same person, the fact that he cannot recover for the liquor does not prevent him from recovering for the board and lodging.³ When a part of the consideration for which a mortgage is executed is an illegal covenant in general restraint of

¹⁶ *Arnott v. Pittsburg, etc., Co.*, 68 N. Y. 558. As to the validity of contracts for exclusive rights, see *Central Tel. Co. v. Averill*, 199 N. Y. 128; 32 L. R. A. (N. S.) 494. A railroad company may grant exclusive privileges to one passenger or baggage transfer company. *Dingman v. Duluth, etc., R. Co.* (Mich.), 32 L. R. A. (N. S.) 1181.

¹⁷ *Klingel's Pharmacy v. Sharp & Dohme*, 104 Md. 218.

¹⁸ See notes to *Grogan v. Chaffee*, 27 L. R. A. (N. S.) 395; 156 Cal. 611; *Park & Sons v. Hartman*, 12 L. R. A. (N. S.) 131; *Jayne v. Loder*, 149 Fed. 21; 7 L. R. A. (N. S.) 984. See also, *Garst v. Charles*, 187 Mass. 144; *Elliman Co. v. Carrington* [1901], 2 Ch. 275.

¹ *Gelpeke v. Dubuque*, 1 Wallace, 221; *Nordenfelt v. Maxim-Nordenfelt Co.* [1894], App. Cas. 549.

² *U. S. v. Bradley*, 10 Peters, 343, 360; *Barnes v. Geary*, 35 Ch. D. 154; *Central Tel. Co. v. Averill*, 199 N. Y. 128.

³ *Chase v. Burkholder*, 18 Pa. 48.

trade, that does not wholly avoid the mortgage.⁴ A covenant not to engage in the manufacture of ocher "in the county of Lehigh or elsewhere," is divisible and valid as to the county.⁵ When the main purpose of the contract is legal, the fact that an incidental or subsidiary stipulation is illegal does not render void the whole agreement.⁶

"The general rule is that where you cannot sever the legal from the illegal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or common law, you may reject the bad part and retain the good."⁷

2. When the contract is indivisible, if any part of the consideration be illegal, the whole contract is void.⁸

3. When the immediate consequence or the direct object of a contract is the doing of an illegal act, the contract is void, although the intention of the parties may be innocent.⁹ Ignorance of the law is no excuse. Contracts made in violation of a statute of which the parties have no knowledge illustrate this rule.

4. When the direct object is innocent but the intention unlawful, the contract may be or may not be void. In the sale of goods for an unlawful use, mere knowledge on the part of the vendor that the goods sold are to be applied to an unlawful use, but one not amounting to felony or involving a wicked crime, does not prevent recovery.¹⁰

"It is no defence to an action brought to recover the price of goods sold that the vendor knew they were bought for an

⁴ *Nicholson v. Ellis*, 110 Md. 322, citing *Fishall v. Gray*, 60 N. J. L. 5.

⁵ *Smith's Appeal*, 113 Pa. 579.

⁶ *King v. King*, 63 Ohio, 363; 52 L. R. A. 158, cited *ante*, § 104, note 2.

⁷ *Willes, J.*, in *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235. But "the Court cannot create or carve out a new covenant for the sake of validating an instrument which would otherwise be void." *Baker v. Hedgecock*, 32 Ch. D. 520. Nor sever a proviso from the rest of the agreement. *Perls v. Saalfield* [1892], 2 Ch. 149.

⁸ *Dean v. Emerson*, 102 Mass. 480.

⁹ *Maryland Trust Co. v. Mechanics' Bank*, 102 Md. 608.

¹⁰ *Fuller v. Hunt*, 182 Mass. 299; *Cheney v. Duke*, 10 G. & J. 11; *Michael v. Bacon*, 49 Mo. 474; *Howell v. Stewart*, 54 Mo. 460.

illegal purpose, provided it is not made part of the contract that they shall be used for that purpose, and provided also that the vendor has done nothing in aid or furtherance of the unlawful design."¹¹ So a contract for the sale of a house by one who knows that the vendee will use it for an unlawful purpose is enforceable.¹²

It has been generally held that if goods are sold in a State where the sale is lawful, the fact that the vendor knows they are to be resold in a State where the sale is prohibited does not prevent him from recovering in the latter State, unless he actively aided in carrying out the unlawful purpose, as, for instance, by packing the goods in a particular way.¹³ It would seem, however, that the rule allowing the seller to recover in this instance should be limited to cases where the use contemplated by the buyer is illegal because a *malum prohibitum*, and is not a *malum in se*. If the seller knows or has reason to believe that the goods are to be used for a treasonable or felonious purpose, he cannot recover.¹⁴

5. "Where losses have been made in an illegal transaction, a person who lends money to the loser, with which to pay the debt, can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used."¹⁵ But the doctrine of some cases is that when the knowledge of the lender is such as to implicate him as a confederate in the transaction, money lent for the express purpose of carrying out an illegal object cannot be recovered.¹⁶

6. Securities, such as notes or bonds, given upon an unlawful consideration or purpose, whether declared by statute to

¹¹ Tracy v. Talmadge, 14 N. Y. 162.

¹² Sprague v. Rooney, 82 Mo. 493.

¹³ Webber v. Donnelly, 33 Mich. 467; Skiff v. Johnson, 57 N. H. 475. But a statute of the latter State may expressly prohibit recovery. Corbin v. Houlehan, 100 Me. 246.

¹⁴ Hanauer v. Doane, 12 Wallace, 342.

¹⁵ Armstrong v. Am. Ex. Bank, 133 U. S. 469.

¹⁶ Waugh v. Beck, 114 Pa. 422; Tyler v. Carlisle, 79 Me. 210; Emerson v. Townsend, 73 Md. 224; Spies v. Rosenstock, 87 Md. 14. As to the recovery of money advanced in furtherance of a wagering contract, see *ante*, § 96.

be void or not, are unenforceable between the immediate parties,¹⁷ but are valid in the hands of *bona fide* holders for value, if they are in the nature of commercial paper.¹⁸ When, however, the statute declares that such securities shall be void, a *bona fide* transferee acquires no rights.¹⁹

7. The Courts will in no case enforce an executory unlawful contract. And if such contract has been executed, no action lies to recover money paid or property transferred under it. The controlling principles are expressed in two maxims:—*Ex turpi causa non oritur actio*;²⁰ and *In pari delicto potior est conditio defendentis*.

The language of Lord Mansfield on this subject has become a legal classic, and is as follows:

“The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff; by accident, if I may say so. The principle of public policy is this: *Ex dolo malo non oritur actio*.

¹⁷ *Embrey v. Jemison*, 131 U. S. 347.

¹⁸ *Sondheim v. Gilbert*, 117 Ind. 71; *Crawford v. Spencer*, 92 Mo. 498; *Shaw v. Clark*, 49 Mich. 384. Cf. *Wyman v. Fisk*, 85 Mass. 238.

¹⁹ *Gough v. Pratt*, 9 Md. 526.

²⁰ The word *causa* in this maxim does not mean motive or consideration, but it means object or thing to be done. So it is said in Justinian's Institutes, 3, 19, 24: *Quod turpi ex causa promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet*. Huc points out (Com. 7, p. 96) that in Roman law the word *causa* only occasionally signifies cause, *i. e.*, that which produces an effect, but that generally it is synonymous with *res*—a thing or performance, either executed or executory. In this sense the word *causa* became *coze* in old French, which later on became *chose* by a softening of the pronunciation, seen in most Latin words beginning with *ca*. Thus *catulus* became *chat*; *castus* became *chaste*; *calor* became *chaleur*. This is the meaning of the word *chose* in our Norman French term, *chose in action*. Huc contends that the word *cause* as used in the Code Napoleon, arts. 1131, *et seq.*, relating to the *cause des obligations*, is erroneously treated by most commentators as meaning *causa efficiens*, that which produces an effect.

No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. * * * So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*."

Even an agent who has rendered services in bringing about an illegal contract between other parties cannot recover compensation, when he is privy to the unlawful design.²²

§ 109. **Exceptions to the Rule of in Pari Delicto.** The few exceptions to, or modifications, of the rule that one party to an illegal contract cannot maintain an action against the other may be classified as follows:

(a) When the party paying money under the unlawful agreement was induced to enter into the same under circumstances of coercion, or where the law which made the agreement unlawful was designed for the protection of such person, he may recover the amount so paid. The parties in such cases are not *in pari delicto*.¹

Where a debtor in order to induce a certain creditor to unite in a composition deed is obliged to pay him an additional sum of money, it may be recovered back because paid under compulsion.² So a mortgage executed by a man to save his son from a prosecution for embezzlement will be annulled upon the mortgagor's application.³ For this reason

²¹ *Holman v. Johnson*, 1 Cowper, 343. In *Collins v. Blantern*, 2 Wilson, 341, Wilmot, C. J., says: "You shall not stipulate for iniquity. All writers upon our law agree in this: no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again; you shall not have a right of action when you come into a Court of justice in this unclean manner to recover it back. *Procul, o procul este profani*." This is a quotation from the *Aeneid*, vi, 258.

²² *Gibbs v. Balto. Gas Co.*, 130 U. S. 396.

¹ *Thomas v. City of Richmond*, 12 Wallace, 349.

² *Atkinson v. Denby*, 6 H. & N. 778. *Cf. Solinger v. Earle*, 82 N. Y. 333; *Crossley v. More*, 40 N. J. L. 27. But a payment made to a creditor after composition cannot be recovered. *Wilson v. Ray*, 10 A. & E. 82.

³ *Foley v. Greene*, 14 R. I. 618. See *ante*, § 90.

also, it has been held that a woman who pays money to a matrimonial agency, which agrees to procure a husband for her, may recover the same, because in such cases, although the contract is unlawful, yet the parties are not *in pari delicto*.⁴

When one party is induced by the fraud of the other to enter into an illegal contract, public policy does not always forbid a recovery of the money thus fraudulently obtained.⁵

(b) When the contract, although prohibited by law, is not *malum in se*, and is still in part executory, a party may rescind it and recover money advanced by him to the other party.⁶ So if, after a wager has been made, one party notifies the stakeholder not to pay over the sum deposited with him, it may be recovered back; the party in such case being allowed a *locus pœnitentiæ*.⁷

There are many cases in which a party is not allowed to repudiate his liability on account of the illegality of the contract and at the same time hold on to what he has received under it from the other party. But these are generally, if not universally, cases where the illegality does not involve any moral turpitude but is merely a statutory *malum prohibitum*. If the contract is illegal because a *malum in se*, the maxim *in pari delicto* would prevent a recovery.

This principle is applied to the contracts of a corporation which are *ultra vires*. When a corporation has received money or property under an executory contract which is *ultra vires*, an action by the other party to the contract lies to recover it back. In such case the action is not on the con-

⁴ Duval v. Welman, 124 N. Y. 156. See *ante*, § 104.

⁵ Hobbs v. Boatright, 195 Mo. 693 (case of a bogus contest). See 2 Pomeroy Eq. Jur. § 941, and 20 Harvard Law Rev. 60.

⁶ Spring Co. v. Knowlton, 103 U. S. 49. See Hermann v. Charlesworth, cited *ante*, § 104. A note appended to Ware v. Spinney, 13 L. R. A. (N. S.) 267, collects cases relating to the rights of a principal who has placed money in the hands of an agent for an illegal purpose to compel its return.

⁷ Lewis v. Bruton, 74 Ala. 317; Fisher v. Hildreth, 117 Mass. 558; McAllister v. Hoffman, 16 S. & R. 147; McDonough v. Webster, 68 Me. 530. See Barclay v. Pearson [1893], 2 Ch. 154.

tract, but to enforce the obligation of the corporation to restore that to which it has no legal title.⁸

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral but because the corporation, by the law of its creation, is incapable of making it, the Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract nor according to its terms; but on an implied contract of the defendant to return, or failing to do that, to make compensation for money or property which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the unlawful contract."⁹

(c) When the illegal transaction has been fully completed, a partner or agent in whose hands the profits thereof are found cannot, in some cases, refuse to account for them.¹⁰ So an agent who has sold goods and received the money under contracts in violation of the Sunday laws must account to his principal.¹¹ When several parties get up a horse fair where pools are to be sold on the races, an agent who receives the money cannot refuse to account.¹² Where a cargo was illegally shipped to South America upon a vessel with a British license, during the war between England and America, the

⁸ *Western Md. R. Co. v. Blue Ridge Hotel Co.*, 102 Md. 308.

⁹ *Central Transp. Co. v. Pullman Co.*, 139 U. S. 60. See also, *Md. Hospital v. Foreman*, 29 Md. 524. As to the liability of a municipal corporation for money which it has borrowed without authority, see *Thompson v. Town of Elton*, 109 Wis. 589.

¹⁰ *Brooks v. Martin*, 2 Wallace, 70; *Planters' Bank v. Union Bank*, 16 Wallace, 500; *State v. B. & O. R. Co.*, 34 Md. 366; *Clarke v. Brown*, 77 Ga. 606; *Bonsfield v. Wilson*, 16 M. & W. 185; *Johnson v. Lansley*, 12 C. B. 468; *Thorne v. Ins. Co.*, 80 Pa. 15. But see *contra*, *Wyckoff v. Weaver*, 66 N. J. L. 648.

¹¹ *Haacke v. Knights of Liberty*, 76 Md. 429.

¹² *Wilson v. Owen*, 22 Mich. 474; *cf. Lemon v. Grosskopf*, 22 Wis. 447.

shipper cannot recover the proceeds from the master if he knew of the license,—otherwise if he did not know of it.¹³

But the Courts will not enforce an accounting for the fruits of a past illegal transaction against a confederate or agent in possession of the same, when the illegal means by which they were originally acquired were a *malum in se* and characterized by moral turpitude, as distinguished from a mere *malum prohibitum*, and both parties participated in the wrong.¹⁴ "The sentiment of honor among thieves cannot be enforced in Courts of justice."¹⁵

In a case where plaintiff and defendant were engaged jointly in the manufacture and sale of certain machines, it was alleged that many of the sales were effected by the bribery of municipal officers and other corrupt means. The parties could not agree upon a settlement, and plaintiff filed a bill for an account and the payment to him, under the agreement between the parties, of one-half of the net profits arising from sales effected, corruptly, as alleged by one of the parties, as well as other sales to which no objection was made. The Court said:¹⁶ "When you come to consider whether you will enforce an accounting for the fruits of an illegal transaction, the question of the degree of guilt, the question of moral turpitude or not, the question of exemplary effect upon the public mind—in short, of public policy—will of necessity materially influence the decision. * * * The practical test to determine the Court in either giving or refusing an account to one of the parties to a past and completed illegal contract as against another is, after all, public policy, and in the application of that test, the Court will look at the circumstances of the particular venture, and at the more or less pernicious and demoralizing effect of the example afforded by its successful prosecution."

¹³ Chappell v. Wysham, 4 H. & J. 560. Cf. Stewart v. McIntosh, 4 H. & J. 23.

¹⁴ Croft v. McConoughy, 79 Ill. 336; Daniels v. Barney, 22 Ind. 207; Green v. Corrigan, 87 Mo. 359; Overby v. Overby, 21 La. An. 493; Jackson v. McLean, 36 Fed. Rep. 213; Edgar v. Fowler, 3 East, 222.

¹⁵ Woodworth v. Bennett, 43 N. Y. 277.

¹⁶ Phelps, J., in Prunty v. Basshor, in Circuit Court of Baltimore City, Daily Record of May 11th, 1889.

It will be seen, therefore, that the distinction between *malum prohibitum* and *malum in se*, which is not important when the mere question of the legality of the contract is concerned, is on the other hand a controlling consideration in determining whether an accounting can be had of the fruits of a past illegal transaction.

VOID, VOIDABLE, AND UNENFORCEABLE CONTRACTS

§ 110. The lack of one or more of the requisites of a valid contract as set forth in the foregoing chapters may render the agreement of the parties wholly void, or voidable, or merely unenforceable.

An unenforceable contract is one which is valid, but incapable of proof or legal enforcement, as contracts within the Statute of Frauds where the requirements of the statute have not been met. If executed it is a good defense.¹

A voidable contract is one capable of being avoided or affirmed at the option of one of the parties, such as the contracts of infants, contracts obtained by fraud, undue influence, etc. The ratification of a voidable contract with knowledge of the facts operates as a renunciation of the right to attack it, and so gives it legal effect from the beginning, according to the maxim *omnis ratihabitio retrotrahitur*.²

A void contract is one destitute of legal effect. In such case one may say—*nullum est negotium, nihil actum est*. The parties have seemed to make a contract, but they have not done so. What has taken place is as if it were not—*e. g.*, a contract made under a mistake as to the existence of the subject-matter. And no rights can be acquired under a void contract.

It is generally said that a void contract cannot be ratified. So it has been held that a deed of confirmation cannot work upon an estate void at law;³ that the power of attorney of an infant being void cannot be ratified by him after attaining

¹ Crane v. Gough, 4 Md. 317; Baker v. Lauterbach, 68 Md. 70.

² See *ante*, ch. vii.

³ Blessing v. House, 3 G. & J. 290, *note*; Gable v. Williams, 59 Md. 54.

majority;⁴ that a deed of property executed by a trustee in equity before ratification of the sale and payment of the purchase money is an absolute nullity, which cannot be waived;⁵ that signing a bill of exceptions by a judge after the expiration of his term of office is a void act, to which no agreement of counsel can give validity;⁶ that an illegal contract cannot be ratified.⁷

To be and not to be are absolute contraries, and hence logic seems to demand that a void contract should be absolutely such, and remain wholly without effect. But this is not always the case.⁸ An illegal contract, for instance, is void, yet money paid under it cannot be recovered back. Sometimes the transaction must be judicially declared void, as in the case of a marriage within the prohibited degrees.⁹ And a void contract may be ratified when the ratification occurs under circumstances permitting a valid contract to be made. So it is said in a recent case, "that sales either voidable or void may be ratified by the acts of the parties in interest. They may be ratified either directly, or by a course of conduct which will estop the party from denying their validity."¹⁰ It would seem that the ratification of a void act should be conceived of as an estoppel, or as to the making of a new contract of similar import. Questions may arise as to the retroactive power of such ratification.

⁴ *Wainwright v. Wilkinson*, 62 Md. 147.

⁵ *Johnson v. Hines*, 61 Md. 122.

⁶ *State v. Weiskittle*, 61 Md. 48.

⁷ *U. S. v. Grossmayer*, 9 Wall. 72; *Troewert v. Decker*, 51 Wis. 49; *Boutelle v. Melendy*, 19 N. H. 196.

⁸ *Dernburg, Pandekten*, 1. 120.

⁹ *Harrison v. Harrison*, 22 Md. 468.

¹⁰ *Long v. Long*, 62 Md. 71. *Windscheid* (*Pandekten*, sec. 82, and n. 10), discusses the ratification of a void act. He points out that as confirmation it can have no effect since no additional life can be given to that which does not exist, but it can only operate as the new creation of a contract of similar effect. He admits, however, that Justinian's legislation certainly recognizes the ratification of void acts. "According to the prevalent opinion the ratification of a void act operates only as the making of a new act, and consequently lacks retroactive power. I repeat that legal consistency certainly demands this,—only it must be added that the ratifier is bound so to act as if the effect of the newly concluded agreement had earlier become operative."

PART III

EFFECTS OF THE CONTRACT

CHAPTER I

PRIVITY OF CONTRACT

§ 111. **Imposing Liabilities.** The agreement of two parties resulting in a contract, creates a personal relation between them, and that agreement cannot impose any liability upon a third person. In some instances however, a man is erroneously led to think that, because as a result of his contract with A. he has conferred a benefit upon C., he has a claim against C. But that is neither the law nor the reason of the matter. If you pay my debts voluntarily and officiously, that gives you no claim against me.¹ If I order goods from A. or work to be done by him, and he engages you to do the work or to supply the goods, you have no right of action against me in case A. fails to comply with his contract to pay you.²

The defendants employed a firm of brokers to transport some cocoa from London to Amsterdam. The brokers employed the plaintiff to transport the cocoa which was done by him without the defendants being aware of the fact. The defendants refused to pay plaintiff upon the ground that they had entered into no contract with him, and it was held that they were not liable because there was no privity between them and the plaintiff.³

§ 112. **Inducing a Party to Break a Contract.** While a contract between A. and B. cannot be made in itself to impose any liability upon a third person, yet that contract creates rights between A. and B. which third persons are bound to

¹ *Dougherty Co. v. Gring*, 89 Md. 535.

² *Carroll v. Benedictine Society*, 88 Md. 317.

³ *Schmalzing v. Thomlinson*, 6 Taunt. 147.

respect. The agreement is a fact which imposes a duty upon those who have knowledge of it. The rule is that a person who knowingly and without just cause induces one of the parties to a contract, to break it, is liable in an action to the other party for an injury so occasioned.¹

"The right to dispose of one's labor as he will, and to have the benefit of one's lawful contract, is incident to the freedom of the individual which lies at the foundation of the government in all countries that maintain the principles of civil liberty. Such right can lawfully be interfered with only by one who is acting in the exercise of an equal or superior right which comes in conflict with the other. An intentional interference with such a right, without lawful justification, is malicious in law, even if it is from good motives and without express malice."²

"Malice in the sense of evil motive or personal ill will is not a necessary condition to make procuring a breach of contract a wrong, actionable at the suit of the contracting party who thereby suffers damage. * * * The word malice is better kept out of such cases altogether."³

A declaration sets forth a good cause of action which alleges that the plaintiff was the owner of certain houses and lots; that the defendant obtained a mortgage thereon from a person whom he knew not to be the owner, and knowing that the mortgage was fraudulent and void caused the tenants of the property to cease paying their rents to the plaintiff, and advertised the property for sale under an *ex parte*

¹ Knickerbocker Ice Co. v. Gardiner Dairy Co., 107 Md. 556; Angle v. Chicago, etc., R. Co., 151 U. S. 1; Read v. The Friendly Society [1902], 2 K. B. 732; Lumley v. Gye, 2 Ellis & B. 216; Bowen v. Hull, 6 Q. B. D. 383; Walker v. Cronin, 107 Mass. 555; Jones v. Stanley, 76 N. C. 355; Raymond v. Yarrington, 96 Tex. 443; Doremus v. Hennessy, 176 Ill. 608; 43 L. R. A. 797. *Contra*: Glencoe Co. v. Com. Co., 138 Mo. 439; Chambers v. Baldwin, 91 Ky. 121; 11 L. R. A. 545; Boyeson v. Thom, 98 Cal. 578. See notes appended to Thacker Coal Co. v. Burke, 5 L. R. A. (N. S.), 1091; Knickerbocker Co. v. Gardiner Co., 16 L. R. A. (N. S.) 747, and Curran v. Galen, 152 N. Y. 33.

² Berry v. Donovan, 188 Mass. 356.

³ South Wales Miners Fed. v. Glamorgan Coal Co. [1905], App. Cas. 239.

decree of foreclosure on the mortgage; that the mortgage was afterwards annulled and vacated by a Court of Equity, that in consequence of the defendant's acts the plaintiff's tenants moved away and plaintiff lost the rents.⁴

The plaintiff, a dairy company, had a contract with the Sumwalt Company, dealer in ice, by which the latter agreed to supply plaintiff with ice during a certain season at a designated price. The Sumwalt Company had a contract under which it procured large quantities of ice from the defendant, the Knickerbocker Company, and the defendant, knowing of the existence of the contract between the plaintiff and the Sumwalt Company and intending to obtain a benefit for itself, notified the Sumwalt Company that if it sold ice to the plaintiff, the defendant would refuse to supply any ice to it. Consequently the Sumwalt Company broke its contract with plaintiff, and the plaintiff was compelled to purchase ice from the defendant at a higher price than that stipulated for in its contract with the Sumwalt Company. It was held that the defendant was liable for the loss thus occasioned to the plaintiff, but that since the defendant's unlawful act was done merely for the purpose of benefiting itself and not for the purpose of injuring the plaintiff, there could be no recovery of exemplary damages.⁵ Afterwards the Sumwalt Company brought an action against the Knickerbocker Company to recover the damages it suffered in consequence of having been thus compelled to break its contract with the dairy company, and it was held that it was entitled to recover.⁶ The principle was laid down that the person who unlawfully or maliciously causes one of the parties to a contract to break it, is liable in damages to the person who is thus made to break his contract for the loss he suffers in consequence of such unlawful act.

When a labor organization causes an employer to discharge the plaintiff because he is not a member of the Union, by

⁴ *Gore v. Condon*, 87 Md. 368.

⁵ *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556.

⁶ *Sumwalt Co. v. Knickerbocker Ice Co.*, 114 Md. 403.

threats directed against the employer's business, the plaintiff has a right of action against the organization.⁷

§ 113. **Contracts for the Benefit of Third Persons.** At common law, a contract was regarded as giving rights and imposing liabilities exclusively between the parties to it. The rule was that the consideration must be furnished by the party to whom the promise was made, and that a stranger to the contract could no more enforce it than it could be enforced against him. There were very few avowed exceptions to the rule. The most striking was that under which when a person who, although in fact unauthorized, yet professed to make a contract as agent of a third person, the latter could afterwards ratify and obtain the benefit of such contract.¹

In other instances, the necessities of the case led Courts of Equity to enforce contracts for the benefit of third persons indirectly, by deciding that one who had obtained property by a promise to do something for a stranger to the agreement held the property as trustee for the latter. Thus when property is transferred to one upon the faith of his promise to divide it with another, or to pay a sum of money to another, a trust is held to be created which equity will enforce.² When a man conveys land to one of his children upon the understanding that the grantee will divide it with the other

⁷ *Lucke v. Clothing Cutters Assembly*, 77 Md. 396; *Temperton v. Russell* [1893], 1 Q. B. 715; *Quinn v. Leatham* [1901], App. Cas. 495; *Giblan v. Nat. Amalgamated Union* [1903], 2 K. B. 600. In 18 *Harvard Law Rev.* 411, Prof. Ames says that the true rule is this: "The wilful causing of damage to another by a positive act, whether by one man alone, or by several acting in concert, and whether by direct action against him or indirectly by inducing a third person to exercise a lawful right, is a tort unless there was just cause for inflicting the damage, and the question whether there was or was not just cause will depend in many cases, but not in all, upon the motive of the actor."

¹ But if the unauthorized agent had merely a secret, undisclosed intention to act on behalf of a third person, the latter could not ratify the contract. *Keighley, Muxsted & Co. v. Durant* [1901], App. Cas. 240.

² *Clark v. Callahan*, 105 Md. 600; *Ahrens v. Jones*, 169 N. Y. 555.

children, equity raises a trust in favor of the latter.³ When one who holds a life insurance certificate in a beneficial order, causes the same to be made payable to a certain person on the faith of his oral promise to pay the proceeds to a third person, equity will enforce the trust against the beneficiary named in the certificate.⁴ When a legatee promises the testator that he will use the property given him by the will for a particular purpose, a trust arises.⁵

In England, and in a few States in this country, (Massachusetts, Connecticut, Michigan, and perhaps two or three others) the common law rule is more or less strictly adhered to, and the right of a third person to sue on a contract made for his benefit is denied.⁶

But the prevailing doctrine in America is that a contract by which, upon a consideration furnished by one of the parties to it, the other party promises to do something for the benefit of a third person, gives to that person a right to sue the promisor in case of non-performance.⁷ The establishment of this doctrine has been gradual, and is a victory of practical utility over theory, of equity over technical subtlety.

³ *Stahl v. Stahl*, 214 Ill. 131.

⁴ *Coyne v. Supreme Conclave*, 106 Md. 54; *Hirsh v. Auer*, 146 N. Y. 16. These are all really contracts for the benefit of a third person and are so treated in *McCoy v. McCoy*, 32 Ind. App. 38.

⁵ *Owings Case*, 1 Bland, 370; *Browne v. Browne*, 1 H. & J. 430; *Gaither v. Gaither*, 3 Md. Ch. 158; *Larmon v. Knight*, 140 Ill. 232; *Trustees of Amherst College v. Ritch*, 151 N. Y. 282; 37 L. R. A. 305.

⁶ But even in Massachusetts the beneficiary of a life insurance policy may sue on it. *Pingrey v. Ins. Co.*, 144 Mass. 374.

⁷ *Hendricks v. Lindsay*, 93 U. S. 149; *Simons Sons Co. v. Md. Telephone Co.*, 99 Md. 141; *First Nat. Bank v. Clark*, 61 Md. 400; *Seigman v. Hoffacker*, 57 Md. 321; *Small v. Schaefer*, 24 Md. 143; *Bay v. Williams*, 112 Ill. 91; *Ingram v. Ingram*, 172 Ill. 287; *Lawrence v. Oglesby*, 178 Ill. 122; *Peterson v. Ry. Co.*, 119 Wis. 196; *Smith v. Pflugger*, 126 Wis. 253; *Ferris v. Am. Brewing Co.*, 155 Ind. 539. See cases collected in note to *Jefferson v. Asch*, 25 L. R. A. 257. A contract between the mother of an illegitimate child and its father made for the benefit of the child is enforceable by it. *Rosseau v. Rouss*, 91 N. Y. App. Div. 234; 86 N. Y. Sup. 497. It is not necessary that the third person to be benefited by the contract be designated by name. *Coster v. Mayor*, 43 N. Y. 411; note to *Knight & Jelleson Co. v. Castle*, 27 L. R. A. (N. S.) 573.

In New York and a few other States, this limitation was put upon the rule, namely, that the third person can use upon such a contract only when the direct promisee owed to him some legal or equitable duty which he sought in this way to discharge. This is sometimes extended so as to include a moral duty of the promisee to a third person such as that of a parent to a child, or a husband to a wife. So it is said: "To give a third party who may derive a benefit from the performance of the promise an action, there must be, first, an intention by the promisee to secure some benefit to the third party, and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it."⁸

But later cases in New York have enforced promises for the benefit of a third person when there existed no legal or equitable obligation of the promisee to such person.⁹ Where a water company agreed with the authorities of a village, in consideration of its franchise, to supply the residents with water at certain rates, it was held that a resident might sue upon such contract.¹⁰

§ 114. **The True Principle.** According to the weight of authority, it makes no difference whether the promisee was under any obligation to the third party or not. If the intention was to benefit the latter, that is sufficient to give him a right of action.¹ That this is the correct view, appears from

⁸ *Vrooman v. Turner*, 69 N. Y. 280. See also, *Lawrence v. Fox*, 20 N. Y. 268; *Blunk v. Dennison Water Co.*, 71 Ohio, 258.

⁹ *Buchanan v. Tilden*, 158 N. Y. 109.

¹⁰ *Pond v. New Rochelle Water Co.*, 183 N. Y. 330.

¹ Cases in note to *Jefferson v. Asch*, 25 L. R. A. 257; *Simon Sons Co. v. Md. Tel. Co.*, 99 Md. 141; *ante*, § 113, note 7.

considerations of practical convenience and of justice as well as from the terms of the contract. If in selling your estate, you wish to make provision for your old coachman Marcus and exact from the purchaser an agreement to pay him an annuity, or to allow him to occupy a house on the estate free of rent, the right of Marcus to sue on this contract, made for his benefit should not be denied because you were under no legal obligation to him.

Effect of seal. When a contract for the benefit of a third party is under seal, some Courts abide by the technical rule that the third party cannot sue, while others make no distinction in this respect between simple and sealed contracts.² In some states, there are statutes which authorize suits by third persons on contracts under seal for their benefit.³

§ 115. **Illustrations.** Where the control of money or property is transferred by A. to B. upon the faith of B.'s promise to deliver the property or to pay a sum to C., then an action lies on the promise by C. against B.¹ The agreement cannot be rescinded after the third party assents to the arrangement.² Where A. and B. put certain sums in the hands of C., who agreed to contribute a like sum and hold the same for the benefit of D., then ignorant of the arrangement, the control of the fund having been relinquished by A. and B., it was held that D. could maintain an action in his own name against C.³

Where A., upon a consideration moving from B., as for instance in part-payment of the purchase money for an article, agrees to pay a debt due by B. to a third party, the latter may sue on the promise.⁴ If in such case the third

² 25 L. R. A. 272, sec. xviii of note; *Van Schaick v. Third Ave. Ry. Co.*, 38 N. Y. 346; *Ricard v. Sanderson*, 41 N. Y. 179; *Webster v. Fleming*, 178 Ill. 140; *Seigman v. Hoffacker*, 57 Md. 321.

³ *Styles v. Long Co.*, 67 N. J. L. 413.

¹ *Creager v. Link*, 7 Md. 259; *Kalkman v. McElderry*, 16 Md. 56; *O'Neal v. Board, etc.*, 27 Md. 227; *Wheat v. Rice*, 97 N. Y. 302.

² *Creager v. Link*, 7 Md. 259.

³ *Hostetter v. Hollinger*, 117 Pa. 606.

⁴ *Barker v. Bucklin*, 2 Denio, 45; *Wood v. Moriarty*, 15 R. I. 518. *Cf. Gable v. Scarlett*, 56 Md. 169. When the assignee of property

party should assent to the arrangement at the time it is made, the case would be one of novation.

Where a promise is made to a parent for the benefit of his child, the latter may sue on it by reason of the near relationship.⁵ So an oral promise made to the mother of a child, upon her surrender of custody, to maintain and educate the child and give him certain property, may be enforced by the child.⁶

When a contract is made for the benefit of a corporation thereafter to be formed, it may be adopted or ratified by the corporation and sued on by it, if not *ultra vires*.⁷

When a promise to accept a bill of exchange is shown to and relied on by a third party, he has a right of action against the promisor.⁸

agrees to pay the debts of the assignor, a creditor of the latter may sue the assignee. *Cox v. Phila. Pottery Co.*, 214 Pa. 373. When a new partnership assumes the debts of the old firm, creditors may sue the former. *Safe Deposit Co. v. Cahn*, 102 Md. 530. Generally, one who agrees to pay another's debt, for a consideration, is liable to the creditor. *Malanaphy v. Fuller, etc., Co.*, 125 Iowa, 719. "Where goods sold on credit are resold by the first buyer to a party who assumes the indebtedness thereon, without the consent of the original vendor, the latter has a right of action against the second buyer, but he cannot hold the first and second buyers *libale* as joint debtors." *Imperial Hotel Co. v. Claflin Co.*, 175 Ill. 119. "A. drew an order on B. directing him to pay to C. the sum of \$250 in merchandise. B. accepted the order (without consideration) while it was still in the hands of A., and the latter subsequently delivered it to C., receiving from him the sum of \$250 therefor. *Held*, that this payment from C. to A. was a sufficient consideration to support B.'s contract of acceptance and that C. has a right of action against B. for refusal to deliver the merchandise" (syllabus). *Elmer v. Loper*, 66 N. J. L. 50.

⁵ *Felton v. Dickinson*, 10 Mass. 287. The early English cases to this effect were overruled in *Tweddle v. Atkinson*, 1 B. & S. 393.

⁶ *Benge v. Hiatt*, 82 Ky. 666. In *Piper v. Hoard*, 107 N. Y. 67, it was held that a child had a right of action on account of a fraud by means of which it was brought into the world.

⁷ *Whitney v. Wyman*, 101 U. S. 392; *Bell's Gap Co. v. Christy*, 79 Pa. 507. See *Grape Sugar Co. v. Small*, 40 Md. 395; *Franklin, etc., Co. v. Hart*, 31 Md. 59.

⁸ *Franklin Bank v. Lynch*, 52 Md. 278; *First Nat. Bank v. Clark*, 61 Md. 400.

Where one purchases property subject to a mortgage and as part of the consideration assumes the mortgage debt, he becomes primarily liable for the same.⁹

Most American cases hold that the person to whom a telegram is sent may maintain an action against the telegraph company for failure to transmit it, or for the negligent alteration thereof.¹⁰

When a policy of life insurance is made for the benefit of a third person, or one of fire insurance, "for whom it may concern," the real party in interest may sue.¹¹

The consignee to whom goods are shipped may sue the carrier for non-delivery, etc., upon the contract made for his benefit by the consignor.¹²

A citizen of a municipality has the right to institute suit against a telephone company to enforce its duty to comply with its contract made with the municipality under an ordinance regulating the rates to be charged subscribers for telephone services.¹³

When A. is bound by contract to do certain work for B. and afterwards C. becomes bound by another contract with B. to do a part of the same work, the latter contract enures to the benefit of A. and if A. does the whole work, he is entitled to recover from C. the cost of doing that part which C. had contracted to perform.¹⁴

⁹ *Genge v. Andrews*, 60 Md. 26; *Gifford v. Corrigan*, 117 N. Y. 257; *Keller v. Ashford*, 133 U. S. 610; *Thompson v. Dearborn*, 107 Ill. 87; *Wyatt v. Dufrene*, 106 Ill. App. 214; *Fanning v. Murphy*, 126 Wis. 538; 4 L. R. A. (N. S.) 667.

¹⁰ *Western U. Tel. Co. v. Dubois*, 118 Ill. 248; *New York, etc., Co. v. Dryburg*, 35 Pa. 298.

¹¹ *Harrison v. McConkey*, 1 Md. Ch. 34, *note*; *Fire Ins. Assn. v. Mer. & M. T. Co.*, 66 Md. 339.

¹² *Balto. Steam Packet Co. v. Smith*, 23 Md. 402; *Balto. & Ohio R. Co. v. Pumphrey*, 59 Md. 390; *Ruhl v. Corner*, 63 Md. 179; *Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537.

¹³ *Simons Sons Co. v. Md. Tel. Co.*, 99 Md. 141. See also, *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, and *Washington County Water Co. v. Hagerstown*, 116 Md. —. When a street railway company fails to comply with its contract with the city to pave a street, an abutting owner has a right of action against the company. *Loeber v. N. O., etc., Co.*, 41 La. Ann. 1151.

¹⁴ *Northern C. Ry. Co. v. United Rys. Co.*, 105 Md. 345.

§ 116. **Indirect Benefit to Third Person.** In considering the right of third parties to sue in the case stated a distinction is to be remarked between contracts which merely authorize a third person to receive performance, or direct the other party to the contract to make performance to him, and contracts which directly empower such third party to demand performance. A simple direction from A. to B. to deliver property or money belonging to A. in B.'s possession to C. gives no right of action to C.¹ And contracts made by agents for their principals are to be sharply distinguished from contracts for the benefit of third persons. An agent is the representative of the principal, and the promise of the other party is really made to him.

A contract between A. and B. which confers merely an indirect and incidental benefit upon C. gives no right of action to C.² Pothier says:³ "It is not a stipulation for another but for myself, when I stipulate that something shall be done for a third person, if I have a personal and appreciable interest that it shall be done, when, for instance, I have contracted with him to do it. Thus, if I have promised James to rebuild his house within a certain time and having other work to do, I contract with a mason that he shall rebuild the house, I stipulate for myself rather than for James, * * * it is only verbally that I stipulate for James, *re ipsa*, and in truth, I stipulate for myself and for my own benefit."

It is generally held that a contract between a water company and a municipality by which the former agrees to supply water, gives no right of action against the water company to a resident whose property was destroyed by fire because the supply of water was insufficient.⁴ But there are some deci-

¹ Eichelberger v. Murdock, 10 Md. 379.

² Durnbeer v. Rau, 135 N. Y. 219; Sullivan v. Sullivan, 161 N. Y. 557.

³ Oblig. nos. 57, 58, quoted and misapplied in Tiernan v. Martin, 2 Rob. (La.) 523.

⁴ Housman v. Trenton Water Co., 119 Mo. 304; 23 L. R. A. 146, note; Nickerson v. Bridgeport Co., 46 Conn. 24; Davis v. Water Works Co., 54 Iowa, 59; Blunk v. Dennison Water Co., 71 Ohio, 251; Allen, etc., Co. v. Shreveport W. Co., 113 La. 1091; 68 L. R. A. 650, overruling Planters Oil Mill v. Monroe, 52 La. An. 1243.

sions to the contrary for which there is much to be said.⁵ Municipal authorities represent the public and are in a certain sense, agents of the public.

There is much conflict of authority as to whether a material man or laborer may sue on a bond given by a contractor to the owner of a building, conditioned for the payment of all claims for labor and materials used in the construction of the building.⁶

One who sends a letter or package through the mails, has no right of recovery against a carrier for breach of his contract with the Government to transport the mails.⁷

§ 117. Rescission of Contract by the Original Parties.

There is much controversy as to the right of the contracting parties to rescind the contract before acceptance of it by the third person for whose benefit it was made. In support of the existence of such right, it may be urged that since the contract was created by their consent, it should be capable of being dissolved in the same way; that what they agreed to make, they can agree to unmake, and that such a contract, so far as a third person is concerned, is a mere offer which may be revoked before acceptance.

But on the other hand, it may be argued that the contract, as soon as it is made, confers a right upon the third person; that those who gave him that right cannot take it away, and that since the contract is for his benefit, his acceptance will be presumed until the contrary appears.

According to the weight of authority, the contract may be rescinded by the original parties at any time before the third person assents to it, but his acceptance makes it irrevocable.¹

⁵ *Paducah Lumber Co. v. Water Co.*, 89 Ky. 340; 7 L. R. A. 77; *Gorrell v. Greensboro Co.*, 124 N. C. 328; 46 L. R. A. 514. See *Pond v. New Rochelle Co.*, 183 N. Y. 330, as to right of citizen to enforce contract of company with municipality into water rates.

⁶ Cases are collected in note appended to *Knight & Jellison Co. v. Castle*, 27 L. R. A. (N. S.) 573.

⁷ *Boston Ins. Co. v. Chicago, etc., R. Co.*, 118 Iowa, 423; 59 L. R. A. 796.

¹ *Hostetter v. Hollinger*, 117 Pa. 606; *Gilbert v. Sanderson*, 56 Iowa, 349; *Putnam v. Farnharm*, 27 Wis. 187; *Boats v. Nixon*, 26 Ill. App. 517; *Gurnsey v. Rogers*, 47 N. Y. 233. *Contra*: *Waterman v.*

It might be considered that since all contracts for the benefit of third persons are not of the same character, there should be no inflexible rule as to the power of the original parties to release it. Some contracts seem to be mere offers to the third person, requiring an acceptance, and others appear to create rights *ipso facto* without acceptance. If, for instance, for a consideration moving from me, you promise to deliver a horse to A. to whom I intend it as a gift, it may perhaps be considered that A.'s acceptance is necessary to put the contract beyond our power to unmake it. But, on the other hand, if I assign property to you and as part of the consideration, you agree to pay my creditors or to discharge a mortgage on the property, it may well be considered that this creates a right in the creditors which we cannot take away by our agreement, even before they have knowledge of the contract made for their benefit.

Professor Williston says:² "If it be admitted that the beneficiary has a direct right of his own, it ought not to be extinguished without his consent. The only question can be, when does the beneficiary's right arise—when the promise for his benefit was made or when he was notified of it or assented to it—for unless a right has vested in the beneficiary before

Morgan, 114 Ind. 237. *Cf. Bay v. Williams*, 112 Ill. 91. In *Tweeddale v. Tweeddale*, 116 Wis. 526, 61 L. R. A. 509, the Court said: "When one person for a consideration moving to him from another, promises to pay to a third person, a sum of money, the law immediately operates upon the act of the parties, establishing the essential of privity between the promisor and the third person, requisite to binding contractual relations between them, resulting in the immediate establishment of a relation of debtor and creditor, regardless of the relations of the third person to the immediate promisee in the transaction; that the liability is as binding between the promisor and the third person as it would be if the consideration for the promise moved from the latter to the former, and such promisor made the promise directly to such third person, regardless of whether the latter has any knowledge of the transaction at the time of its occurrence; that the liability being once created by the acts of the immediate parties to the transaction and the operation of the law thereon, neither one nor both of such parties can thereafter change the situation as regards the third person without his consent."

² Williston's edition of Wald's *Pollock on Contracts*, pp. 273, 274.

the rescission or release he cannot object. The question is analogous to that arising from a gift of property or the creation of a trust for the benefit of another. As a gift is a pure benefit to the donee there seems no reason why his assent should not be presumed, unless and until he expresses dissent. According to this view the sole beneficiary acquires a right immediately upon the making of the contract and any subsequent rescission is ineffectual. There is weighty authority in support of this view; but in most jurisdictions the distinction has not been clearly stated in the decisions between cases of sole beneficiary and cases of debtor and creditor. Most of the cases have been of the latter sort, and it has generally been laid down broadly as true of all cases that prior to the assent or acting upon the promise by the third party but not afterwards, a rescission or release is operative. In theory, however, in a case of debtor and creditor the situation is very different from that arising where the third person is a sole beneficiary.”³

§ 118. **Right of Promise to Sue.** It being established that the object of a contract may be a performance to be rendered to a third party, vesting such third party with a right of action, the question arises whether such contract also gives

³ A constitution of the Emperor Diocletian (Codex 8, 55, 3), declared that the acceptance of the third party was not necessary, and that the promisor was bound to him *ipso facto* by the promise, and the beneficiary had an immediate and direct right of action. Pothier (Oblig. n. 72), in citing this provision, said that natural equity creates the obligation to third persons. His views were adopted by the compilers of the Code Napoleon, who provided in Art. 1121, that “one may contract for the benefit of a third person when that is the condition of the stipulation which one makes for himself, or a gift that one makes to another. He who has made this contract cannot revoke it, if the third person has declared his purpose to take advantage of it.” Huc (Com. vii, p. 73) says that the effect of this provision is that the right of the third person arises directly and immediately from the agreement between the promisor and the promisee; that the right of the third person is in reality derived from the unilateral declaration of the will of the promisor, distinct from the contract upon which it is based, and that the only effect of his acceptance is to make this right irrevocable.

a right of action to the promisee. It might be argued that he who makes a contract for the benefit of a third person is himself the real contractor, the promise being for his benefit also, and in the person of the third party performance is really made to him, and hence he should have a right of action.¹

It is sometimes said that unless the promisee has some beneficial interest himself he cannot maintain an action on the promise.² But in several cases it has been distinctly ruled that either the third party, for whose benefit the contract is made, or the promisee may sue.³ That the promisee should, in some cases at least, be allowed to maintain an action, seems to be necessary. Suppose, for instance, that A. sells a horse to B., who promises as part of the consideration to pay C., the amount due him by A. for the livery of the horse. C. does not choose to enforce his right of action against B., but exacts payment from A. It is clear that A. should then have a right of action on the promise made to him by B. to pay C., because otherwise a part of the price would remain unpaid.

¹ Windscheid, Pandekten, § 316.

² *Seigman v. Hoffacker*, 57 Md. 325; *Dimmick v. Register*, 92 Ala. 458.

³ *Steene v. Aylesworth*, 18 Conn. 244, 253; *Merriam v. Pine City Lumber Co.*, 23 Minn. 314, 323; *Tinkler v. Swaynie*, 71 Ind. 562; *Gunnell v. Emerson*, 73 Mo. App. 291. See *Churchill v. Hunt*, 3 Denio, 321; 2 Greenleaf on Evi. § 109. As to the right of a municipality to sue on a contract made with it by a water company concerning the price at which water will be supplied to residents, see *Washington County Water Co. v. Hagerstown*, 116 Md. —.

CHAPTER II

ASSIGNMENT OF CONTRACTS

§ 119. **Assignment of Liabilities.** The debtor cannot put another person's liability in place of his own without the assent of the creditor.¹ The assignee of a leasehold interest may assign the same so as to escape liability for rent thereafter accruing, but the original lessee cannot relieve himself from continued liability by any assignment.²

If the contract does not involve any personal skill or experience, the party bound to its performance may assign it in the sense that he can have the work done or the goods delivered by a third person, but he himself remains liable under the contract, and the other party has no right of action against the third person so employed to do the work.³

When by an agreement between the original parties and a third person, the latter is to perform in the place of the first promisor, there is a novation, and the original contract is extinguished.

§ 120. **Assignment of Debts and Choses in Action.** At common law, since contracts were regarded as creating a strictly personal obligation, even a debt could not be assigned so as to give the assignee the right to sue in on his own name, except in the case of negotiable instruments. In equity, however, the right of an assignee was recognized and enforced when the circumstances of the case afforded a ground for the administrator of equitable remedies. The assignee was allowed to sue at law in the name of the assignor.

¹ A man "has a right to the benefit he contemplates from the character, credit and substance of the person with whom he contracts." *Humble v. Hunter*, 12 Q. B. 310.

² *Moale v. Tyson*, 2 H. & McH. 387, note; *Donelson v. Polk*, 64 Md. 504; *Stewart v. Long Island R. Co.*, 102 N. Y. 601.

³ *British Waggon Co. v. Lea*, 5 Q. B. D. 149.

But now, very generally by statute, and in some States independently of statute, the assignee of a chose in action for the payment of money, is entitled to sue in his own name at law. The English Judicature Act of 1873, for instance, makes any debt or legal chose in action assignable, by an absolute assignment in writing when notice is given to the debtor. "Henceforth in all courts, a debt must be regarded as a piece of property capable of legal assignment in the same sense as a bale of goods."¹

Under such a statute, or independently of it, it has been held that a life insurance policy is assignable. It is but a chose in action.² An account for medical services and medicine may be assigned.³ A man for whom a sum has been levied in the county taxes may assign the same.⁴ A vendor's lien is assignable.⁵ A widow may assign her right of dower.⁶ The right to indemnification for damage done by a foreign nation is assignable.⁷ There is no discrimination between express and implied contracts. Both are assignable when for the payment of money only.⁸ The subject of the assignment must have an actual or potential existence at the time of the assignment.⁹ A claim for wages may be assigned.¹⁰ Independently of statute, an express promise by the debtor to pay the assignee enables the latter to sue in his own name.¹¹

¹ *Fitzroy v. Case* [1905], 2 K. B. 364.

² *Harrison v. McConkey*, 1 Md. Ch. 34; *Rittler v. Smith*, 70 Md. 261; *Fitzgerald v. Rawlings*, 114 Md. 470.

³ *Crawford v. Brooke*, 4 Gill, 213.

⁴ *Baden v. State*, 1 Gill, 165. Rents not yet due may be assigned without a transfer of the land. *Brownson v. Roy*, 133 Mich. 617.

⁵ *Watson v. Bane*, 7 Md. 117.

⁶ *Maccubbin v. Cromwell*, 2 H. & G. 443. Alimony is not assignable. *Paquine v. Suary* [1909], 1 K. B. 608.

⁷ *Plater v. Scott*, 6 G. & J. 116.

⁸ *Crawford v. Brooke*, 4 Gill, 214.

⁹ *Hamilton v. Rogers*, 8 Md. 301; *Hudson v. Warner*, 2 H. & G. 415.

¹⁰ *Shaffer v. Union Mining Co.*, 55 Md. 74. As to assignment of wages to be earned, see *Mallen v. Wenham*, 209 Ill. 252.

¹¹ *Onion v. Paul*, 1 H. & J. 114. When the person by whom money is to become payable upon the completion of certain work accepts an order drawn on him by the workman directing payment to be made

The assignment must be in writing signed by the assignor or his agent. If not, the suit must be brought in the name of the assignor.¹² The owner of a claim may by parol authorize another to assign it in writing, and any number of assignments may be made.¹³ The assignment need not be by writing on the instrument itself. So the bequest of a single bill is a sufficient assignment.¹⁴ A blank endorsement and delivery of the instrument constitutes the party to whom it is delivered the absolute owner, and confers upon him power to fill up the blank with a full assignment to himself.¹⁵ If the assignee is not required to sue in his own name, but only authorized to do so, ~~He~~ ^{he} may still sue in the name of the assignor for his own use, if he prefer, except in the case of bills of exchange and promissory notes.¹⁶

Notice to debtor. The assignee should notify the debtor of the assignment.¹⁷ If the debtor pay the claim after assignment, but before notice thereof, he is released.¹⁸ "He is free if he has fulfilled his obligation to the original creditor without notice of any assignment; he is equally free if he fulfils it to the assignee of whose right he is first informed, not knowing either of any prior assignment by the original creditor or of any subsequent assignment by the new creditor."¹⁹ But payment by the obligor to the obligee after

to an assignee, such person becomes liable to the assignee for the full amount mentioned in the assignment, upon completion of the work, and he is not entitled to deduct therefrom money afterwards paid by him to the workman. *Blakistone v. German Bank*, 87 Md. 302.

¹² *Tradesmen's Bank v. Green*, 57 Md. 602.

¹³ *Spyker v. Nydegger*, 30 Md. 315.

¹⁴ *Kent v. Somerville*, 7 G. & J. 265.

¹⁵ *Chesney v. Taylor*, 3 Gill, 251.

¹⁶ *Hampson v. Owens*, 55 Md. 586.

¹⁷ When a fund is being administered in a Court of Equity, the filing of an assignment of it in the cause is notice to the trustee or custodian. *Lambert v. Morgan*, 110 Md. 1. As between assignor and assignee notice to the debtor is not necessary to the validity of the assignment. *Miller v. Stockton*, 64 N. J. L. 614.

¹⁸ *Robinson v. Marshall*, 11 Md. 251.

¹⁹ *Pollock*, *Contracts*, 210.

notice of a *bona fide* assignment of the bond does not discharge the debt.²⁰

Priority between assignments. The doctrine of some Courts is that when the person entitled to a fund makes two or more assignments of it to different parties, the assignee who first gives notice to the debtor or custodian of the fund is entitled to priority of payment over other assignments, although made earlier in time.²¹ But other Courts hold that the person to whom the assignment is first made is entitled to priority over a subsequent assignee who is the first to notify the debtor.²²

In Equity; no formal writing is necessary in order to constitute a valid assignment of a fund.²³ An assignment may be by parol.²⁴ Any writing or act which clearly indicates that the assignor intends to make over a fund belonging to him, amounts in equity to an assignment.²⁵ But there must be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on

²⁰ *Savage v. Gregg*, 150 Ill. 161; *Shriner v. Lanborn*, 12 Md. 170. See also, *Stine v. Young*, 26 Md. 233; *Canfield v. McIlvaine*, 32 Md. 94. As to attachment laid in hands of debtor before or after assignment, see *Williams v. Jones*, 38 Md. 556; *Brady v. State*, 26 Md. 290; *Wilson v. Carson*, 12 Md. 54; *Lawrence Bank v. Raney Co.*, 77 Md. 321.

The assignment is complete as between assignor and assignee when made and before notice to the debtor. And the death of the assignor of even a part of a fund does not revoke the authority of the debtor to pay the assignee. *Raesser v. Nat. Ex. Bank*, 112 Wis. 591.

²¹ *Lambert v. Morgan*, 110 Md. 1; *Phillips' Estate*, 205 Pa. 515; *Houser v. Richardson*, 90 Mo. App. 134; *Graham Co. v. Pembroke*, 124 Cal. 117; *Copeland v. Manton*, 22 Ohio, 401; *Bank v. Ins. Co.*, 17 D. C. App. 113; *Methuen v. Staten Island Co.*, 66 Fed. Rep. 113; *Dearle v. Hall*, 3 Russell, 1; *Lloyd's Bank v. Pearson* [1901], 1 Ch. 865. See also, *Judson v. Corcoran*, 17 How. 612; *Spain v. Hamilton's Admr.*, 1 Wall. 604; *Laclede Bank v. Schuler*, 120 U. S. 511.

²² *Fortunato v. Patten*, 147 N. Y. 277; *Sutherland v. Reeve*, 151 Ill. 384; *Thayer v. Daniels*, 113 Mass. 129; *Emley v. Perrine*, 58 N. J. L. 472.

²³ *Owens v. Barroll*, 88 Md. 204.

²⁴ *Crane v. Gough*, 4 Md. 317.

²⁵ *Brokaw v. Brokaw*, 41 N. J. Eq. 215.

the assignee, although the circumstances may not admit of its immediate exercise.²⁶

Assignment of the whole of a fund. When an order is drawn for the whole of a particular fund, it amounts to an equitable assignment, and after notice to the drawee it binds the funds in his hands.²⁷

Assignment of part of a fund. At law, an assignment of part of a debt cannot be enforced against the debtor by the assignee unless the debtor assent to the same. He cannot be compelled to pay an entire debt in parts.²⁸ So a check on a bank does not operate as an assignment *pro tanto* of the fund upon which it is drawn, until it is accepted, or certified to be good, by the bank holding the funds.²⁹

But the rule in equity is different, and there the assignment of part of a fund or debt constitutes an equitable charge upon it which will be enforced against the debtor, or person holding the fund.³⁰ To create such assignment and lien it is indispensable that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it.³¹

The rule of some Courts is that equity has jurisdiction of a bill to enforce the assignment of part of a fund.³² But the doctrine of other Courts is that such assignee of a part cannot maintain a bill in equity merely because he is unable to sue at law, in a case where a fund is not in a Court of

²⁶ *Christmas v. Russell*, 14 Wallace, 70; *Dillon v. Barnard*, 21 Wallace, 440.

²⁷ *Mandeville v. Welch*, 5 Wheaton, 285; *Gibson v. Finley*, 4 Md. Ch. 75, note; *Wilson v. Carson*, 12 Md. 74; *Savage v. Gregg*, 150 Ill. 161.

²⁸ *Gibson v. Finley*, 4 Md. Ch. 75, note; *Carter v. Nichols*, 58 Vt. 553.

²⁹ *Moses v. Franklin Bank*, 34 Md. 580. But the rule in some States is different. *Niblack v. Park Bank*, 169 Ill. 517.

³⁰ *James v. City of Newton*, 142 Mass. 366; *Burnett v. Crandall*, 63 Mo. 410.

³¹ *Wright v. Ellison*, 16 Wallace, 22; *Pugh v. Porter*, 112 U. S. 737.

³² *Smith v. Bates Machine Co.*, 182 Ill. 166.

Equity for distribution or where there is no other ground for the interference of Equity.³³

Restriction on assignment. When the contract is made the parties may stipulate that it shall not be assigned generally,³⁴ or shall not be assigned to a particular person.³⁵

§ 121. **Rights of the Assignee.** The assignee of a claim takes it subject to all the legal and equitable defences against it in the hands of the assignor at the time of the assignment.¹ But the equities subject to which he takes are those of the debtor himself, and not equities of third parties against the assignor.² When the assignee knows that his assignor bears a particular relation to the party from whom he acquires his title, he is affected with notice of the consequences of such relation.³

There are circumstances which may place the assignee in a better situation than the assignor. Whenever the former is induced to believe by the debtor that the claim assigned will be paid, he cannot afterwards set up as a defence a concealed equity existing between him and the assignor.⁴ Nor can the debtor purchase conditionally claims against the assignor for the purpose of using them as a set-off, or claims acquired after the assignment.⁵

When the acceptance of an order for the payment of a sum out of a particular fund is conditional, the assignee has no right of action unless the condition be performed.⁶ And

³³ *Hayward v. Andrews*, 106 U. S. 672; *Adair v. Winchester*, 7 G. & J. 114, note (b); *Skobis v. Ferge*, 102 Wis. 122.

³⁴ *Mueller v. N. W. University*, 195 Ill. 263.

³⁵ *La Rue v. Groezinger*, 84 Cal. 284. The right to object to the assignment may be waived. *Staples v. Somerville*, 176 Mass. 241.

¹ *Goldsborough v. Cradie*, 28 Md. 478; *Schafferman v. O'Brien*, 28 Md. 565.

² *Ohio In. Co. v. Ross*, 2 Md. Ch. 26; *Timmis v. Shannon*, 19 Md. 297.

³ *Green v. Early*, 39 Md. 224.

⁴ *Kemp v. McPherson*, 7 H. & J. 320; *Johnson v. Ins. Co.*, 39 Md. 233.

⁵ *Fusting v. Sullivan*, 51 Md. 489.

⁶ *Gill v. Weller*, 52 Md. 8. *Cf. Conselyea v. Blanchard*, 103 N. Y. 222.

when the order has been accepted upon certain conditions, the debtor cannot give evidence of a contract, other than that referred to in the acceptance, between him and the assignor, and of which the assignee had no knowledge.⁷

Liability of assignor. The assignor makes no implied warranty that the debt will be paid and has no greater liability than the seller of chattels generally.⁸ Where defendant, the obligee in a single bill, assigned it for value to the plaintiff by an endorsement in blank not under seal, at the same time promising plaintiff to pay the same if the obligor did not, it was held that the assignment imposed no liability upon the defendant, and that his parol promise to guaranty the debt was void, because not in writing as required by the fourth section of the Statute of Frauds.⁹

§ 122. **Assignment by Way of Subrogation.** When a surety pays the debt of his principal to the creditor, he is subrogated to the rights and lien of the creditor against the principal debtor. Such payment operates as an assignment in equity of the debt and of the securities given for it. The debt is discharged as to the creditor but it is not extinguished as between the debtor and the surety. The right of the surety to be subrogated is not founded upon contract but upon principles of equity and natural justice. The creditor cannot refuse to assign the debt to the surety and his obligation to do so is enforceable in equity.¹

When an executor pays to the creditors a greater amount of assets than he has received and the personal estate of the deceased is insufficient to pay his debts, the executor may be substituted in equity to the rights of the creditors against

⁷ *Hunting v. Emmart*, 55 Md. 265.

⁸ *Robinson v. McNeill*, 51 Ill. 225; *Shirts v. Irons*, 37 Ind. 98. See *Burek v. Taylor*, 152 U. S. 634.

⁹ *Talbot v. Suit*, 68 Md. 443. But when the seller of a claim against a third party guarantees that it will be paid, the promise is not within the Statute of Frauds. *Little v. Edwards*, 69 Md. 469.

¹ *Wallace v. Jones*, 110 Md. 143; *Bechervaise v. Lewis*, L. R. 7 C. P. 377.

the real estate of the deceased.² But an agent of a mortgagee, appointed to collect interest coupons, who voluntarily pays the interest instead of making collections, is not subrogated to the rights of the mortgagee.³

§ 123. **Assignment of Contracts.** A contract other than one for the payment of money, such as a right to receive goods, may be assigned when it does not involve a relation of personal confidence.¹ But when the contract is to sell goods on credit, the vendee cannot assign it so as to vest the assignee with a right to demand the goods and enjoy the credit, without the assent of the seller.² In the case last cited the Court classified the principal instances in which a contract, other than the payment of money, could be assigned as follows:

(a) "Cases of agreements to sell and deliver goods for a fixed price, payable in cash on delivery, in which the owner would receive the price at the time of parting with his property, nothing further would remain to be done by the purchaser, and the rights of the seller could not be affected by the question whether the price was paid by the person with whom he originally contracted or by an assignee.

(b) Cases upon the question how far executors succeed to rights and liabilities under a contract of their testator.

(c) Cases of assignments by contractors for public works, in which the contracts and the statutes under which they were made, were held to permit all persons to bid for the contracts and to execute them through third persons.

² *Collinson v. Owens*, 6 G. & J. 4.

³ *Bennett v. Chandler*, 199 Ill. 97. *Cf. Baker v. Meloy*, 95 Md. 1.

¹ *Francisco v. Smith*, 143 N. Y. 488; *Galey v. Mellen*, 172 Pa. 443. But a contract of employment cannot be assigned. *Globe, etc., Co. v. Jones*, 129 Mich. 664. When a contract to manufacture goods involves personal confidence it cannot be assigned by the manufacturer. *Schlesinger v. Forest Products Co.*, 78 N. J. L. 637; 30 L. R. A. (N. S.) 347. A contract for the sale of trees to be grown is assignable. *Parsons v. Woodward*, 22 N. J. L. 196.

² *Arkansas Smelting Co. v. Belden*, 127 U. S. 379. See also, *Delaware County v. Diebold Co.*, 133 U. S. 473.

(d) Other cases of contracts assigned by the party who was to do certain work, not by the party who was to pay for it, and in which the question was whether the work was of such a nature that it was intended to be performed by the original contractor only."³

A contract for the sale of the product of a certain vineyard for fixed number of years may be assigned by the seller when he conveys the vineyard to the assignee.⁴

A contract by which a party agrees to do work for another, when trust is reposed in the skill and knowledge of the person employed to do the work cannot be assigned by the latter without the consent of the other party so as to entitle the assignee to do the work and recover the contract price.⁵

When one agrees to supply a cake manufacturer with all the eggs he may require in his business at a certain place, the latter cannot assign the contract to the company which takes over his business and might have different requirements.⁶

When the contract is to supply all the chalk which a company making Portland Cement may require, on a certain designated piece of land, it may be assigned to another company, since under the terms of the contract, no greater burden will be placed on the party agreeing to supply the chalk.⁷ In this case the Court said, in reference to the statement that contracts involving special personal qualifications are

³ When a contract to do work is assigned the assignor remains liable. In *British Waggon Co. v. Lea*, 5 Q. B. D. 149, it was held that when it can be inferred that the person employed to do work has been selected with reference to his individual skill, competency or other personal qualifications, then the contract must be performed by him. But this is not the case when the contract is to keep wagons in repair—"a simple description of work which ordinary workmen, conversant with the business, would be perfectly able to execute." In such case the repairs may be done by any person with whom the company might enter into a subsidiary contract.

⁴ *La Rue v. Groezinger*, 84 Cal. 281.

⁵ *Eastern Advertising Co. v. McGaw*, 89 Md. 72. A contract to publish books cannot be assigned. *Wooster v. Crane & Co.*, 73 N. J. Eq. 22.

⁶ *Kemp v. Baerselman* [1906], 2 Ch. 610.

⁷ *Tolhurst v. Associated Manufacturers* [1902], 2 K. B. 669.

not assignable, that "what is meant is, not that contracts involving obligations not special and personal can be assigned in the full sense of shifting the burden of an obligation on to a substituted contractor, any more than when it is special and personal, but that, in the first case the assignor may rely on the act of another as performance by himself, whereas in the second case, he cannot. He cannot vouch the capacity of another to perform that which the other party to the contract might, however unreasonably insist was what alone he undertook to pay for,—namely, work to be executed by the party himself."

A corporation agreed to erect a stave factory at a certain place and to operate it so long as the timber supply would warrant. Defendant agreed to furnish the site for the factory for ten years and to deliver to it a certain quantity of timber. This contract was held to be assignable by the company.⁸

A. agreed to sell his reversionary interest in certain land to B. who assigned the contract to C. It was held that C. was entitled to maintain an action for the breach of the contract, which was a legal chose in action.⁹ A contract to cut and deliver wood to a railroad company is assignable by the company.¹⁰

§ 124. **Assignment by Operation of Law.** The rights and liabilities under a contract not involving personal confidence or skill pass by operation of law to the executor or administrator of a deceased party. Covenants running with the land pass to the assignees thereof.

⁸ *Northw. Lumber Co. v. Byers*, 133 Mich. 534.

⁹ *Torkington v. Magee* [1902], 2 K. B. 427. The assignee of a contract to purchase land has the same right as his assignor to take advantage of a breach of the contract by the vendor, including the right to rescind the contract and recover money expended by the assignor. *Latimer v. Copay Valley Land Co.*, 137 Cal. 286, citing *Gilbert v. Peteler*, 38 N. Y. 165; *McIndoe v. Mormon*, 26 Wis. 592. As to assignment of optional contract to buy land, see "Conditional Contracts," *post*, Part v, ch. 1.

¹⁰ *Atlantic, etc., R. Co. v. Atlantic Co.*, 147 N. C. 368; 23 L. R. A. (N. S.) 223

PART IV

INTERPRETATION OF THE CONTRACT

CHAPTER I

EVIDENCE RELATING TO THE CONTRACT

§ 125. **In General.** A contract may be wholly in writing, or wholly by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties. But if the contract be one within the Statute of Frauds, all of it must be in writing.¹

If the contract is oral, it is the province of the Jury in the event of a controversy to decide what terms were actually agreed upon by the parties.² If it is alleged that the agreement was in writing, then that fact must be proved. When a written contract was signed by only one of the parties, and was acted on by both, it is admissible in evidence as their agreement.³

Parol evidence is admissible to show that an instrument of writing signed by the parties and in form a complete contract, was not intended by them to be binding or was made upon a condition.⁴ The real agreement which plaintiff's agent and the defendant made by parol was that plaintiff

¹ *Fisher v. Andrews*, 94 Md. 46.

² *Roberts v. Bonaparte*, 73 Md. 191.

³ *Western Md. R. Co. v. Oberndorff*, 37 Md. 281; *Allen v. Sowerby*, 37 Md. 410.

⁴ *Burke v. Dulaney*, 153 U. S. 234; *Reynolds v. Robinson*, 110 N. Y. 654; *Adams v. Morgan*, 150 Mass. 143; *Donaldson v. Uhlfelder*, 21 D. C. App. 489.

"If two parties have entered into a contract and one of them afterwards requests the other to address to him letters that are capable of the construction that such a contract has not been made, the conversation that induced the writing of such letters is admissible proof upon the question of the existence of the contract." *Globe, etc., Co. v. Kern Co.*, 67 N. J. L. 280.

should carry in the street cars certain advertisements for the defendant in consideration of a designated sum, but at the request of plaintiff's agent, the defendant signed a written contract purporting to be for a greater amount of advertising and for a much larger sum. This was done because the agent said that he would thereby be enabled to induce other persons to pay the rates mentioned in such writing by showing it to them, but that it was not to be in any manner binding on the defendant. Upon the face of the written contract was printed this stipulation: "No verbal conditions made by agents will be recognized. Every condition must be specified on the face of this contract." It was held that parol evidence of these facts was admissible to show that the written instrument was not intended to be a binding contract, and since there was not a contract, no question as to the authority of the agent to make verbal conditions arose in the case.⁵

When the contract sued on is in a foreign language, the jury must ascertain the meaning of the terms upon the evidence of persons skilled in the particular language and the original contract is admissible in evidence, together with the translations of the witnesses. If there are two or more different versions, it is for the jury to determine which one is correct.⁶

§ 126. **Evidence as to the Contract.** The general rule on this subject is that when a contract has been reduced to writing, no evidence can be given of the terms of such contract except the writing itself; and the contents of such writing cannot be contradicted, altered, added to, or varied, by oral evidence of any previous or contemporaneous agreement.¹ All antecedent negotiations are merged in the writing which is considered as furnishing the best evidence of the final intention of the parties. There is no rule of law better

⁵ *Southern Advertising Co. v. Metropole Shoe Co.*, 91 Md. 61.

⁶ *Badart v. Foulon*, 80 Md. 579.

¹ *Thomas v. Scutt*, 127 N. Y. 137; *Reddington v. Ianahan*, 59 Md. 430; *Bladen v. Wells*, 30 Md. 577.

settled, or more inflexible. It is, however, confined to the parties to the instrument.²

The exceptions to this rule are:

1. Where the terms proved are collateral or supplementary to the writing. Thus parol evidence is admissible to show a subsequent agreement enlarging the time or changing the place of performance.³ So where the written contract was for the sale of certain property for a certain price, parol evidence is admissible to prove the manner and terms of payment, this being a collateral fact about which the paper is silent.⁴

2. When explanation of the terms of the contract is required. So in the case of a devise of a "lot of ground on L. street," parol evidence may be used to show the sense in which the word "lot" was used.⁵ The circumstances out of which a contract grew may be reverted to for the purpose of ascertaining its subject-matter and the relation of the parties thereto.⁶ Where the terms of the writing are technical or equivocal, oral evidence may be used to explain the art or trade to which they relate.⁷

3. Evidence is admissible of the usage or custom of a trade or locality to add a term to the contract, or to attach a special meaning to the words. The parties are presumed to contract with reference to the usage and it is as obligatory as if incorporated in the contract.⁸ He who deals in a particular market must be taken to deal according to the custom

² *Grove v. Reutch*, 26 Md. 368.

³ *Coates v. Sangston*, 5 Md. 121. See as to proof of collateral terms, *Mead v. Dumlerie*, 174 N. Y. 108.

⁴ *Paul v. Owings*, 32 Md. 402; *Fusting v. Sullivan*, 41 Md. 162.

⁵ *Warner v. Miltenberger*, 21 Md. 265. See also, *Owings v. Baker*, 54 Md. 82.

⁶ *Reed v. Ins. Co.*, 95 U. S. 23; *Brawley v. U. S.*, 96 U. S. 168; *Merriam v. U. S.*, 107 U. S. 437.

⁷ *Drury v. Young*, 58 Md. 547; *Aetna Indemnity Co. v. Waters*, 110 Md. 673.

⁸ *Appleman v. Fisher*, 34 Md. 540; *Biggs v. Langhammer*, 103 Md. 94. See generally, note to *Wigglesworth v. Dallison*, 2 Smith's Leading Cas. 866.

of that market.⁹ It is for the jury to determine whether a usage exists or not, and whether the parties contract with reference to it or not.¹⁰

A valid usage must possess the following characteristics:

(a) It must be general and uniform so as fairly to give rise to the presumption that the parties were acquainted with it, and intended to contract with reference to it.¹¹ In such case it is not necessary to prove that it was known to the other party.¹² But it must be proved that the parties contracted with reference to a partial and local usage if they are to be bound by it.¹³

(b) It must not be repugnant to, or inconsistent with, the terms of the contract.¹⁴ If it appear that the parties did not mean to be governed by the usage no evidence respecting it can be received. "It can only be admitted either as an aid to interpretation when the meaning of the terms of the contract is equivocal or obscure, or to add some incident consistent with the terms of the contract, but about which the parties are silent."¹⁵

(c) The usage must not be in contravention of the general rules of law, or of statute.¹⁶

⁹ *McCullough v. Hellweg*, 66 Md. 269; *Kraft v. Fancher*, 44 Md. 216.

¹⁰ *Burroughs v. Langley*, 10 Md. 248. But when a usage is established as being general, it is not necessary to show affirmatively that it was known to the other party. *Lyon v. George*, 44 Md. 295; *Barker v. Borzone*, 48 Md. 474.

¹¹ *Duling v. P., W. & B. R. Co.*, 66 Md. 126; *Citizens' Bank v. Graf-fin*, 31 Md. 507.

¹² *Blake v. Stump*, 73 Md. 160; *Given v. Charron*, 15 Md. 502.

¹³ *Patterson v. Crowther*, 70 Md. 124.

¹⁴ *DeWitt v. Berry*, 134 U. S. 306; *Gilbert v. McGinnis*, 114 Ill. 28; *Balto. Baseball Club v. Pickett*, 78 Md. 375; *German Bank v. Renshaw*, 78 Md. 475; *Gibney v. Curtis*, 61 Md. 192.

¹⁵ *Busby v. Ins. Co.*, 40 Md. 580.

¹⁶ *First Nat. Bank v. Taliafero*, 72 Md. 164; *Susq. Fer. Co. v. White*, 66 Md. 444. A usage may be made invalid by a subsequent statute. *Frazier v. Warfield*, 13 Md. 279. And a statute cannot in general be repealed by a subsequent contradictory usage. *Cutler v. Howe*, 122 Mass. 541; *Colgate v. Penn. Co.*, 102 N. Y. 120; *Dela-plaine v. Haxall*, 15 Grattan, 459; *Godcharles v. Wegeman*, 113 Pa. 431. But it seems that sometimes the Courts will recognize that a

(*d*) It must be reasonable.¹⁷

4. Parol evidence is admissible to affect a written contract in the application by equity of its jurisdiction in cases of mistake or fraud.¹⁸

statute is obsolete. *Schaferman v. O'Brien*, 28 Md. 574. So it is said in the Digest, 1, 3, 32 § 1, *Rectissime etiam illud receptum est ut leges non solum suffragio legislatoris sed etiam tacito consensu omnium per desuetudinem abrogentur*. And a general law may be controlled by a special local usage varying from it. *Bank of Columbia v. Fitzhugh*, 1 H. & G. 250.

¹⁷ *Rosenstock v. Tormey*, 32 Md. 170; *Curtis v. Gibney*, 59 Md. 155; *Oelrichs v. Ford*, 21 Md. 491.

¹⁸ *Wood v. Patterson*, 4 Md. Ch. 335.

CHAPTER II

THE CONSTRUCTION OF CONTRACTS

§ 127. **In General.** The true principles of construction may be well illustrated by certain analogies from the civil law. In that system contracts are divided into those that are *stricti juris* and those that are *bonae fidei*. The former are interpreted literally, and the parties are bound only for the exact performance mentioned. In contracts *bonae fidei*, on the other hand, the construction is liberal, and the parties are bound to perform, not necessarily what a literal construction of the contract might seem to require, but “rather whatever can be fairly and reasonably required according to the circumstances of the case,—which may be either more or less than was actually promised.”¹ In these *negotia bonae fidei* certain liabilities are imposed upon the parties, whether expressly promised or not, because they must perform what, under the particular circumstances of the case, good faith requires them to perform.

This doctrine pervades our law also, although this particular distinction is not expressly made. In the construction of these contracts, the Court merely discovers and enforces what would have been agreed upon by the parties, if their attention had been called to the point, and if they had been acting in good faith and with full knowledge. The unexpressed obligations in these instances, which are implied by law, are those which are inherent in the transaction according to its true nature, and may be regarded as the unexpressed intention of the parties. It is not now necessary, in each case as it arises, to discover anew the whole unexpressed intention, because we inherit from former ages a set of rules embodying the result of this investigation,—rules whose justice and excellence are vindicated by the experience

¹ Sohm, Institutes, § 63; English translation, p. 286.

of daily life. This principle explains the origin and reason of these rules. The circumstance that good faith in this sense has been required produces this inestimable consequence—that the great majority of the decisions of the Courts are ethically justified in the opinion of all enlightened persons who are acquainted with the facts.

It is generally said that contracts will be construed according to the intention of the parties. But, as above shown, this means not only what they did actually intend but also what, according to the essential nature of the particular transaction, the law considers that they should have intended. No intention can, however, be read into a contract unless it is thus a necessary legal implication. In each contract, there is a general law applicable to all similar cases. This is the unexpressed intention as above explained. There is also to be discovered the particular intention of the parties, which constitutes the individuality of the case. This must be expressed, for the Court will not make a contract for the parties by implying any intention not common to all such cases. When, however, a particular kind of contract is made, it is presumed that the parties intended to embody all the legal consequences of the act, whether they knew of them or not, unless it can be seen from the language they used that they intended to exclude some of them.²

The greater number of contracts are *bonae fidei*, and their construction is, therefore, according to the above mentioned principles, a liberal one.³ Thus a contract of sale is not satisfied by the mere delivery of the thing sold. If the article is taken from the buyer by a person having a superior title, the seller is liable in damages, because under the circumstances good faith requires him to perform more than was actually promised. This principle is stated in our law

² Sometimes the legal consequences may be thus excluded and sometimes they cannot. Parties may agree, for instance, that a debt shall not bear interest after maturity, but if they stipulate that upon failure to pay a debt of \$100 at maturity the sum of \$500 shall be due, that is an agreement for a penalty and will not be enforced.

³ In the modern civil law, all contracts are *bonae fidei*.

under the form of a rule that in the sale of a chattel there is an implied warranty of title. The same observation is applicable to the other warranties implied in the contract of sale. The parties in all contracts of bailment are legally held to the exercise of the degree of care required by *bona fides* under the circumstances, although not stipulated for. Certain contracts, such as those of insurance or of composition with creditors, are designated as being *ubberimae fidei*, and this principle is applied to the formation of the contract as well as its construction.⁴ In contracts of agency, of partnership and for service, the liabilities of the parties are not to be ascertained merely from a consideration of the language used. The rules established in the case of the rights and liabilities of the parties in the case of an incomplete or inexact performance of a building contract also illustrate this doctrine of good faith, and are not dependent upon the language used in the contract. So, if an agent engages in a business which conflicts with that of his principal, he may be dismissed, although the contract imposes no obligation upon him not to do so.⁵ On the other hand, a party is sometimes only liable in law to perform less, instead of more, than he expressly promised. Thus a promise to pay \$1,000 in case the promisor fails to perform any stipulation in a contract containing promises of various degrees of importance is unenforceable when the other party has not been damaged by the breach to the extent of \$1,000. Justice demands that the party in default should only be required to make good to the other party the actual amount of his loss. This principle is stated under the form of a rule that the Courts will not enforce penalties for the breach of a contract.⁶

But there are certain contracts which may be regarded as being *stricti juris* because strictly construed, in which there is no obligation to perform more or right to perform less than a literal and logical interpretation of the exact language of the promise demands. Thus the liability of guarantors and

⁴ See *ante*, Part ii, ch. 7.

⁵ *Adams Express Co. v. Trego*, 35 Md. 47.

⁶ See *post*, Part v, ch. 3, "Contracts with Penal Clauses."

sureties is never extended by implication. It is generally said that a surety has a right to stand upon the letter of his obligation, and is liable for nothing unless it is so "nominated in the bond." While a contract for the sale of land belongs to the other class, yet an actual conveyance is strictly construed. In a deed there is, for instance, no implied warranty of title, and if the vendee is evicted he has no such remedy against the vendor as the buyer of personal property has.⁷ So a covenant to pay a certain rent for demised premises is enforceable although the property is afterwards destroyed by fire.

Implication of terms. "When a contract, as expressed in writing would be futile and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual."⁸ "Where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."⁹ "Although a contract may appear on the face of it to bind and be obligatory only upon one party, yet there are occasions in which you must imply,—although the contract may be silent,—corresponding and correlative obligations on the part of the party in whose favor the contract may appear to be drawn up."¹⁰

An instrument by which an insurance company agrees to pay a certain commission to an agent for one year constitutes a valid agreement, although the agent does not expressly agree to render the services, because in such case the intention of the parties is manifest, that there should be a correlative

⁷ *Middlekauf v. Barrick*, 4 Gill, 291, *note*.

⁸ *Bowen, L. J., in Oriental, etc., Co. v. Tylor* [1893], 2 Q. B. 527. See also, *Black v. Woodrow*, 39 Md. 194; *Eckenrode v. Chemical Co.*, 55 Md. 51.

⁹ *Lord Blackburn in Mackay v. Dick* (1881), 6 App. Cas. 263.

¹⁰ *Churchward v. The Queen*, L. R. 1 Q. B. 173.

obligation upon the part of the agent."¹¹ When one orders a railroad car and the company agrees to furnish it, there is no lack of mutuality in the contract so made since there is an implied agreement on the part of the shipper either to use the car or to pay for it.¹²

The construction of contracts, in so far as it concerns the discovery of the particular intention and meaning of the parties, as distinguished from the general, unexpressed intention common to all similar transactions, and implied or imputed by the rules of law, deals with the language the parties have used. It is not a science which can be taught, but an art which must be learned by experience and practice. Theory can only point out the leading points of view.¹³

§ 128. **Rules of Construction.** The following rules relating to construction in this sense must be applied with due regard to their interdependence.

1. The object of the Court in construing a contract is to ascertain and effectuate the intention of the parties, as appears from the whole of the agreement. The Court will look at the time when and circumstances under which the agreement was made,—its subject-matter, the relation of the parties, and the object to be accomplished, in order to ascertain the intention of the parties.¹

And evidence of these matters is admissible so as to put the Court in the situation of the parties who made the contract.²

¹¹ *Travellers' Ins. Co. v. Parker*, 92 Md. 22. This is the language of the syllabus which I use for the reason mentioned *ante*, p. 22, note 21.

¹² *Clark v. Ulster & D. R. Co.*, 189 N. Y. 93; 13 L. R. A. (N. S.) 165. See also as to implication of obligation, *Minn. Mill Co. v. Goodnow*, 40 Minn. 497; 4 L. R. A. 202.

¹³ Windscheid, *Pandekten*, § 20.

¹ *Merriam v. U. S.*, 107 U. S. 441; *Nash v. Towne*, 5 Wallace, 689; *First Nat. Bank v. Gerke*, 68 Md. 449; *Chamberlain v. B. & O. R. Co.*, 66 Md. 518; *Babcock Co. v. Moore*, 62 Md. 163; *Schneider v. Turner*, 130 Ill. 28. *In conventionibus, contrahentium voluntatem potius quam verba spectari placuit.* Dig. 50, 16, 219.

² *Machen v. Hooper*, 73 Md. 342; *Roberts v. Bonaparte*, 73 Md. 191.

The Court has a right to know all the material facts which were known to the parties at the time when the agreement was made.³ "In all cases, the object is to see what is the intention expressed by the words used. But from the imperfection of language, it is impossible to know what that intention is without inquiring further and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from those circumstances which the persons using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used, * * * In the case of a contract, the two parties are speaking of certain things only, and therefore the admissible evidence is limited to those circumstances of and concerning which they used those words."⁴ Therefore a contract is not to be construed according to the mere ordinary general meaning of the words, "but according to the ordinary meaning of the words as applied to the subject matter with regard to which they are used, unless there is something which obliges you to read them in a sense which is not their ordinary sense in the English language as so applied."⁵

When a charter party requires a vessel to take the northern passage, the Court must ascertain from the evidence which of the passages usually taken by vessels on the particular voyage contemplated was meant by the term "northern passage."⁶

Thus, a policy of marine insurance on a vessel from Honolulu via Baker's Island to a port in the United States provided that the risk should be suspended "while the vessel is at Baker's Island loading." The vessel arrived at the island in the afternoon of one day and was anchored. A storm soon afterward arose, and two or three days later the ship was wrecked, before the loading began. In an action against

³ *Hart v. Hart*, 18 Ch. D. 693.

⁴ Lord Blackburn, in *River Weir Commissioners v. Adamson*, 2 App. Cases, 763.

⁵ *Lion Ins. Assn. v. Tucker*, 12 Q. B. D. 186.

⁶ *The John H. Pearson*, 121 U. S. 469.

the insurer the question was whether the above-mentioned clause in the policy meant that the risk was suspended while the vessel was at Baker's Island for the purpose of loading, or only while there actually loading. The Court received evidence showing the dangerous character of the moorage at Baker's Island, and held that the object of the provision was to suspend the risk while the vessel was in that exposed place, and not merely while the loading was actually going on, and that, therefore, the loss occurred at a time when the insurer was not liable.⁷

2. The contract must be construed according to the natural and fair import of its terms.⁸ This rule means that the words must be taken as the parties understood them and not necessarily in their grammatical or etymological signification. "The letter killeth, the spirit giveth life." There can be no true construction that is not made in good faith.⁹

⁷ *Reed v. Ins. Co.*, 95 U. S. 23. In *Browne v. Paterson*, 165 N. Y. 460, a doubt as to the meaning of a contract was solved by a consideration of the subject-matter. The contract was as follows: "February 19th, Sold to A. for account of B. one-half of the cargo per Wachusett, chartered to load not exceeding 2,200 tons, usual good merchantable quality nitrate of soda, to arrive at New York, *bought to be a March and or April, 1889, shipment*, from the west coast South America." B., the seller, had at that time chartered the vessel, which was then on the west coast. The vessel began loading April 30th, and sailed June 20th. She sprang a leak, put into a port for repairs, and did not arrive in New York until December 31, 1889. The evidence showed that it was customary for vendors to sell nitrate after making contracts in South America for shipment, and that the sale in this case to A. was made upon the faith of such a contract which B. had made. When the nitrate arrived in New York on the last day of the year, A. refused to accept it. It was *held*, that the words, "to be a March or April shipment," would create a warranty or condition that the shipment was to be made in those months, but that the words, "bought to be, etc.," describe the previous acts of the seller, and not the purpose of the buyer, and that the subject-matter of the sale was nitrate bought by the seller for this shipment.

⁸ *Hall v. Bank*, 53 Md. 120; *Taylor v. Turvey*, 33 Md. 505; *Hatch v. Douglas*, 48 Conn. 116.

⁹ This rule was violated in the construction placed upon the contract in the case of *Shylock v. Antonio*, which kept the word of promise to the ear and broke it to the hope. The jurist from Padua

The grammatical and ordinary sense of the words "is to be adhered to unless they would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further."¹⁰

"A contract," said Lord Ellenborough,¹¹ "is to be construed according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense, unless they have generally in respect of the subject-matter, or by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some special and peculiar sense."

The language used by one party is to be "construed in the sense in which it would reasonably be understood by the other";¹² or in special cases in the sense in which the promisor knew that the promisee understood it.¹³

3. *Repugnant clauses. Recitals.* While the rule is that a contract is to be construed as a whole and effect given to every part of it, yet there may be repugnant and inconsistent clauses that make impossible the application of the rule. In such a case, the clause which is in conflict with the true object of the contract is to be disregarded in order to give

should have held the bond to be void. The legal aspects of this celebrated case have been frequently discussed—best of all by von Jhering in his *Kampf um's Recht* (translated under the title of "The Struggle for law"). Soon after this little book appeared I remember hearing Windscheid refer to it, in a lecture at the University of Leipzig, as being extraordinarily brilliant (*ausserordentlich geistreich*).

¹⁰ *Grey v. Pearson*, 6 H. L. C. 106.

¹¹ *Robertson v. French*, 4 East, 135, cited in *Hart v. Standard Marine Ins. Co.*, 22 Q. B. D. 501; *Glynn v. Margetson & Co.* [1893]. App. Cas. 358.

¹² *Fowkes v. Manchester, etc., Assn.*, 3 B. & S. 929.

¹³ *White v. Hoyt*, 73 N. Y. 505; *Wells v. Carpenter*, 65 Ill. 447; *Birrell v. Dryer*, 9 App. Cas. 345.

effect to the real intention of the parties as it appears from the construction of the whole contract.¹⁴ "When in a contract, a repugnancy is found between clauses, the one which essentially requires something to be done to effect the general purpose of the contract itself, is entitled to greater consideration than the other which tends to defeat a full performance, and repugnant words may be rejected in favor of a construction which makes effectual the evident purpose of the entire instrument."¹⁵

The manufacturers of an article, agreed to sell a large proportion of the whole output to defendant who agreed to buy a designated quantity every year. A subsequent clause provided that if the purchaser should fail to order and pay for the stipulated amount, "this agreement shall thereupon *ipso facto* and without any notice, action or proceeding" on the part of the seller, become null and void. It was held that this provision did not defeat the right of the seller to recover damages for the buyer's failure to order the stipulated quantity.¹⁶

The recital in a contract is generally distinct from the promise, and in case of inconsistency between the two, the promise prevails.¹⁷ "If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred."¹⁸

4. *Construction by acts of the parties.* I venture to submit that the rule as generally laid down in the books on this subject, in broad terms, is erroneous. That rule is, that when there is doubt as to the proper meaning of an instrument, the construction which the parties to it have themselves put upon it, is entitled to great consideration, but

¹⁴ *Straus v. Wanamaker*, 175 Pa. 213.

¹⁵ *Morrill, etc., Con. Co. v. Boston*, 186 Mass. 220.

¹⁶ *Vickers v. Electrozone Co.*, 67 N. J. L. 665.

¹⁷ *Williams v. Barkley*, 165 N. Y. 57; *Monks v. Provident Institution*, 64 N. J. L. 86.

¹⁸ *Ex Parte Dawes*, 17 Q. B. D. 286, approved in *Williams v. Barkley*, 165 N. Y. 57.

when its meaning is clear, the construction made by the parties is not controlling.¹⁹ In a recent case,²⁰ the Court said: "It is true that the parties interested have acted upon the agreement for more than forty years and their conduct shows that they have always understood it until lately as meaning what the defendants contend it does mean. * * * The rights of the parties must be decided now as the Court would have decided them as the agreement became binding, and before the parties had shown by their conduct how they understood it." On appeal in this case,²¹ Halsbury, L. C., said: "The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the party can alter or qualify words which are plain and ambiguous."

Notwithstanding these numerous authorities, there are some which assert what seems to be the true principle, namely, that the construction which the parties themselves, both of them, have placed upon their contract, is manifestly to be preferred to that which a Court may afterwards consider to be the plain meaning of their language. Indeed, what better way is there of ascertaining what the parties meant by their contract than by considering what they did in execution of it? Each man is the best interpreter of his own words.²² If the language used did not express the common intention of the parties, then either of them would have been entitled to have the contract reformed in equity. But they do not become aware of this mistake in expression until long afterwards.

¹⁹ *Railroad Co. v. Trimble*, 10 Wallace, 367; *Sternburgh v. Brock*, 225 Pa. 287; *Menage v. Rosenthal*, 175 Mass. 358; *Grinton v. Strong*, 148 Ill. 587; *Davis v. Sexton*, 35 Ill. App. 410; *Riley v. Askins*, 157 Ind. 336; *Diamond v. Shriver*, 114 Md. 643; *Mitchell v. Wedderburn*, 68 Md. 139; *Citizens' Ins. Co. v. Doll*, 35 Md. 90; *Hutchins v. Dixon*, 11 Md. 40; *Ringgold v. Ringgold*, 1 H. & G. 74. The full rigor of the rule was thus expressed by Lord Denman in *Rickman v. Carstairs*, 5 B. & Ad. 663: "The question in cases of construction of written instruments is not what was the intention of the parties, but what is the meaning of the words they have used."

²⁰ *Lord Hastings v. N. E. Ry. Co.* [1899], 1 Ch. 663.

²¹ *Lord Hastings v. N. E. Ry. Co.* [1900], App. Cas. 263.

²² *Quilibet est optimus verborum suorum interpres.*

The practical construction should at least operate as an estoppel upon both parties to deny that the contract had the meaning given to it by their performance. If this was an erroneous construction of the language used, then the maxim *communis error facit jus* should apply.

This is not the case when, after a contract has been made, the parties disagree as to its meaning. The rule then applicable is that neither party is at liberty to modify the contract or interpret it arbitrarily. Moreover, when both parties agree in construing the contract, it might be regarded, if necessary, as a modification by agreement or as the making of a new agreement to be implied from their conduct. The practical performance of the contract in a certain way is an acknowledgment by each party as to what its meaning was when made, and unless he can show that such execution was the result of a mistake, he should be estopped to deny its accuracy.²³

In *Haines v. Smith*,²⁴ the Court said: "It would be a disgrace to any system of jurisprudence to permit one party to catch another, contrary to the spirit of their contract, by a form of words which perhaps neither party understood."

In another case the grant was of the right to dig for and remove coal, ore, salt, oil and other minerals. The construction placed by the parties upon the contract showed that the intention was to grant the right to take oil exclusively, and it was held that the lease did not include coal, although expressly mentioned.²⁵ The Court said: "When the parties have interpreted the contract themselves, and acted upon such interpretation, the Court will regard it as the proper one and enforce it accordingly. * * * Courts will, if they can, give to the contracts of parties the exact effect which

²³ Giorgi says (*op. cit.*), iv, n. 182, that the interpretation which the parties have themselves put upon their contract in executing it is the sovereign rule of construction (*è la regina di tutte le interpretazioni*).

²⁴ 12 Maine, 429.

²⁵ *McMillin v. Titus*, 222 Pa. 500 (72 Atl. 240) citing *Gillespie v. Iseman*, 210 Pa. 1; *People's Nat. Gas Co. v. Braddock Wire Co.*, 155 Pa. 22. But see *Sternbergh v. Brock*, 225 Pa. 287.

the parties themselves gave to them, and interpret them just as they interpreted them. When the Court is asked to say what the parties meant or intended by their contract, it is entirely safe to point to their own construction of it as evidenced by their course of dealing under it."

If in making a loan with a member, a building association places a certain construction upon the contract which is in conformity with the construction of the borrower, and is an inducement to him to make the loan, the association cannot afterwards allege that that construction was not the true meaning of the contract.²⁶

5. *Doubt as to meaning.* If upon the interpretation of a contract as a whole there remains a doubt or uncertainty as to its meaning, the words are to be taken most strongly against the party employing them.²⁷ Where doubt exists as to the construction of an instrument prepared by one party, upon the faith of which the other has incurred obligations, that construction should be adopted which will be favorable to the latter party.²⁸ This rule is frequently applied in the interpretation of insurance contracts.

So it is said in the Pandects: "An agreement obscurely expressed, or of doubtful meaning, must be interpreted against a vendor or locator, such persons having it in their power to set down the terms of their contract more clearly."²⁹

The rule on this subject of the Roman jurists³⁰ adopted by Pothier and thence transferred to the Code Napoleon is

²⁶ *Building & Loan Assn. v. Berlan*, 125 Iowa, 23. See also, *The S. L. Watson*, 118 Fed. 945; *Dexter Paper Co. v. McDonald*, 103 Md. 381; *Nat. Bank of Metropolis v. Kennedy*, 17 Wallace, 19.

²⁷ *Varnum v. Thruston*, 17 Md. 471; *Orient Ins. Co. v. Wright*, 1 Wallace, 456; *Moulou v. Am. L. Ins. Co.*, 111 U. S. 335; *Massie v. Belford*, 68 Ill. 290.

²⁸ *Noonan v. Bradley*, 9 Wallace, 394; *Halpin v. Ins. Co.*, 120 N. Y. 73; *Bank v. McVeigh*, 32 Grattan, 542; *Wetmore v. Pattison*, 43 Mich. 439; *Sharp v. Thompson*, 100 Ill. 447.

²⁹ Dig. 2, 14, 39.

³⁰ *In stipulationibus cum quaeritur quid actum sit, verba contra stipulatorem interpretanda sunt.* Dig. 45, 1, 38, § 18. *Ambiguitas contra stipulatorem est.* Dig. 34, 5, 26.

thus expressed in Art. 1162 of the Code: "When there is doubt, the contract is to be construed against him who has stipulated and in favor of him who contracted the obligation." He who stipulates, the *stipulator*, means the promisee, or the person in whose favor a certain performance is demanded.

A commentator says³¹ that this is not a rule of interpretation, for interpretation means the employment of certain methods of reasoning in order to ascertain the hidden meaning of an agreement and the real intention of the parties. What this article proposes is not to untie the knot, but to cut it. This is the last resource of construction at bay. It is construction avowing itself impotent in the presence of impenetrable obscurity. The rule is designed for a case where the doubt and perplexity of the Judge is absolute.

One reason given for the rule is that in case of doubt, the debtor should be favored rather than the creditor. This is unsatisfactory because, before the law, all parties are equal and each is entitled to what belongs to him.

Another and more juridical reason given is that the construction should be against the promisee because the doubt is really imputable to him, since he dictated the terms of the contract.

In reality, this rule is the consequence of another of more general scope, namely, that the burden of proof is upon him who asserts the existence of a juridical fact. He who demands the performance of a contract must prove his right. He who alleges that he has been discharged, must prove the payment or fact which effects his discharge.

You demand a certain performance which you stipulated in an agreement which made me a debtor to you. You demand—therefore you must prove, or better still, you assert, therefore the burden of proof is on you. If you fail to make the proof, *or if there is doubt*, the simple consequence is that your claim against me is not to be allowed. *Actore non probante reus absolvitur*—when the plaintiff does not make out his case, the judgment is for the defendant.

³¹ Demolombe, *Traité des Contrats*, ii, nn. 24, 25.

But suppose that you have made out your proof and I assert in turn that I am discharged, by virtue of a certain clause. I must certainly prove this, for then I am the claimant. I affirm. If I do not furnish this proof, or if *there is doubt*, I shall not be discharged. Then the doubt in the contract is construed against the debtor. The debtor or promisor could dictate the terms of his release, and it is his fault if he does not supply the proof.

It follows that a doubt is not always construed against the same party in a contract. The dubious clause is sometimes construed against one and sometimes against the other, according as the one or the other is claimant and makes an affirmation for his benefit. In bilateral contracts where there are correlative obligations, each of the parties is promisor and promisee, and consequently plaintiff and defendant, according as the performance of the clause is asked for by one against the other. It depends upon the position thus assumed how the doubt will be resolved, the doubtful clause being sometimes construed in favor of the one and sometimes in favor of the other. So in a contract of sale, which is the typical bilateral contract, Domat says that the seller is bound to express distinctly the subject-matter, its qualities, etc., and all that may give rise to a misunderstanding. If in the language there is ambiguity, or obscurity, it should be construed against him.³²

6. When a contract, or a clause in a contract, is susceptible of two constructions, it should be interpreted as having that meaning according to which some effect can be given to it, rather than in the sense according to which it would have no effect, or would be unlawful.³³

³² Domat, *Lois civiles*, liv. 1, tit. 1, § 2, n. 16. Another old writer quoted by Demolombe (*loc. cit.*) says that the seller dictates the terms of sale (*qui vend le pot, dit le mot*), and that there are more fool buyers than fool sellers.

³³ *Hobbs v. McLean*, 117 U. S. 568; *Russell v. Allerton*, 108 N. Y. 288; *Rankin v. Rankin*, 216 Ill. 132. *Quoties, in stipulationibus, ambigua oratio est, commodissimum est id accipi, quo res, de quo agitur, in tuto sit.* Dig. 45, 1, 80.

7. To technical words their technical meaning should be given unless a contrary intention appears to have been that of the parties.³⁴

8. Where general words follow others of more particular meaning, they are to be construed as limited to things of the same sort as are designated by the particular words.³⁵ *Noscitur a sociis*.³⁶

However general may be the terms in which a contract is expressed, it embraces only those things concerning which the parties appear to have dealt. It is not necessary that effect should be given to all the redundancies, pleonasms and vain repetitions in which some contracts abound.

9. Contracts are to be construed with reference to the usages of a particular trade or locality if they are not inconsistent with the terms employed.³⁷

10. When the contract is partly written and partly printed and there is a conflict between the two parts, that which is written will prevail over the printed part, because it is presumed to have received closer attention.³⁸

11. Punctuation of the instrument may be considered in the construction, if the punctuation itself has not created an ambiguity.³⁹

12. A contract is to be construed with reference to the laws in force at the time and place of its execution.⁴⁰

³⁴ *Md. Coal Co. v. C. & P. R. Co.*, 41 Md. 352; *Elgin v. Joslyn*, 136 Ill. 525; *Warn v. Brown*, 102 Pa. 347.

³⁵ *Alabama v. Montague*, 117 U. S. 602; *Stettauer v. Hamlin*, 97 Ill. 312.

³⁶ *Smith on Contracts*, 558.

³⁷ See *ante*, § 126.

³⁸ *Clark v. Woodward*, 80 N. Y. 518; *Thornton v. Sheffield, etc., Co.*, 84 Ala. 109; *Loveless v. Thomas*, 152 Ill. 479.

³⁹ *Olivet v. Whitworth*, 82 Md. 258; *Tyrrell v. Mayor*, 159 N. Y. 239; *White v. Smith*, 33 Pa. 186; *Black v. Herring*, 79 Md. 146; *Osborn v. Farwell*, 87 Ill. 89; *Joy v. St. Louis*, 133 U. S. 1.

⁴⁰ *Brown v. Smart*, 69 Md. 330; *Culver v. Atwood*, 67 Ill. App. 304; *Von Hoffman v. City of Quincy*, 4 Wallace, 535; *Walker v. Whitehead*, 16 Wallace, 314.

PART V.

PARTICULAR CONTRACTS

CHAPTER I

CONDITIONAL CONTRACTS

§ 129. **In General. Various Meanings of the Word Condition.** A contract is based upon a condition in a technical sense when the promise of one or both of the parties to perform it is not absolute, but depends upon the occurrence of some future event, or when, upon the happening of a future event, a contract previously made may be rescinded.

But the word "condition" is also used in various other senses, and often without having any definite technical meaning attached to it. Sometimes it designates any essential requisite of a contract, such as the consent or capacity of the parties, or the legality of their object. It is sometimes used to indicate the offer of a promise for an act, as when one agrees to pay a sum of money if his lost property is found and restored. In such case, the doing of the act is spoken of as the condition of the offeror's liability, but it is in reality the consideration which supports the promise, and no contract is made until the act is done.

The word "condition" is frequently used to show that the due performance of an absolute promise by one party must precede the obligation of the other party to perform his counter-promise. Thus, when goods are sold by description or by sample, it is said to be a condition of the contract that the goods delivered shall correspond with the description or the sample.¹ In such cases, the existence of the contract itself is not conditional, nor are the promises themselves in terms conditional, but the duty of the buyer to pay

¹ Sale of Goods Act, § 13; Benjamin on Sales, § 918; *Columbian Iron Works v. Douglas*, 84 Md. 44.

does not arise until after due performance by the seller. And so when a charter party states that the vessel is about to sail from a named port, the accuracy of that statement is called a condition of the charterer's liability.²

In these transactions, there is either an absolute promise or a statement as to a fact which is the basis of the contract, and therefore the term warranty or representation or promise would be much more appropriate than condition. But since the Courts, both of this country and of England treat these promises or statements as conditions, that is as promises which must be performed, or as facts which must exist, before liability to perform the counter-promise arises, they must needs be considered under the head of conditions.

This particular class of conditions I shall designate as promissory conditions, since they are founded on the promise of one of the parties that a certain event will happen, or upon his representation or warranty that it has already occurred. In all other kinds of conditions, where the word is used with the precision and clearness which attaches to it in the civil law, the promise of a party is not that a future event will occur, but that if it does occur, he will be bound.

That these promissory conditions are not true conditions, but are merely terms of the contract, like a statement as to time or place of delivery of goods sold, or as to their quality, will be clearly seen, if, in the following extract from the well-known judgment of Lord Abinger in *Chanter v. Hopkins*,³ the word *condition* be substituted, as it well may be, for the word *warranty*: "If a man offers to buy peas of another and he sent him beans, he does not perform his contract, but that is not a *warranty*. There is no *warranty* he should sell him peas; the contract is to sell peas, and if he sends him anything else, in their stead, it is a non-performance."⁴

² *Davison v. Von Lingen*, 113 U. S. 49.

³ 4 M. & W. 399.

⁴ The various, indefinite and ambiguous meanings of the word "condition" as used in English law, appear from the following state-

§ 130. **True Conditions.** In a real conditional contract, the happening of the future event to which the obligation is subordinated depends either (a) upon chance, accident, hazard or some contingency, or (b) upon the individual will or act of one of the parties, or (c) upon the will or act of a third person. But the promisee has no right of action against the promisor in case the event does not happen, or the condition is not fulfilled, unless the latter prevents its performance. The promisor engages to be liable if the event happens, but he does not undertake to bring it about, or to be liable if it does not occur.¹ A policy of fire insurance is a typical conditional contract. In consideration of the premium, the insurer agrees to pay a stipulated sum upon the happening of a future and uncertain event.

ment in Willis on Law of Contract of Sale of Goods, 132, etc.: "Warranty is an assurance or a promise that something exists, generally in a matter collateral with the principal object of the contract, but it is a promise that something exists, not necessarily that anything will be done by the vendor.

"Then a condition is some fact or event upon which may depend the very existence of the contract of sale. Sometimes the condition is merely a provision that in a certain event the contract shall be void, or only valid upon the happening of a certain event.

"Sometimes neither the condition itself nor the contract contains any promise that the event shall happen or that something exists. The non-fulfillment of the condition in such a case will annul the contract without imposing any obligation on the party in whose behalf the condition was imposed.

"Sometimes the condition itself may contain an agreement or promise that the event exists or shall happen. In this latter case, if the event does happen, the contract may sometimes be annulled; sometimes the contract may be regarded as subsisting and an action of damages brought for the breach of the agreement contained in the condition. If the statement or affirmation is a representation merely, you must show that it is fraudulent if you wish to recover damages.

"If the statement is false, but not fraudulent, perhaps it may be used by way of defense to the action. It is not in either case part of the contract. If the representation is part of the contract, then of course there is a promise; it may be also a condition. You may either use the statement as a condition to put an end to the contract, or an agreement the breach of which will give rise to a claim of damages."

¹ Pandectes Francaises, vol. 42, § 793.

Whether the parties intended to make an absolute or conditional contract is a question of construction. It must be determined from a consideration of the language used and the subject-matter and purpose of the parties whether they have stipulated for something which can be demanded as a right or for a liability which is only to arise upon the happening of a future and fortuitous event. For instance, A.'s house is subject to a mortgage. B. promises to buy it if, within a certain time, the mortgage is released. Can B. compel A. to pay the mortgage? If the parties intended to make an absolute sale with an obligation on A.'s part to discharge the mortgage, then B. has this right. But if they intended to make a conditional sale to take effect only if A. chooses to pay the mortgage, then B. has not the right.²

Such expressions as *provided that*, *if*, *upon the happening*, *upon doing*, generally indicate conditions. The effect of the word *when* depends upon the context. A promise to pay a sum of money when A. dies is absolute, because the event is certain as well as future. But a sale of goods to be delivered when a certain vessel arrives, is conditional.³ "A con-

² This is the case put in Dig. 18, 1, 41, and is there thus solved.

³ *Smith v. Myers*, L. R. 7 Q. B. 139. In *Lovatt v. Hamilton*, 3 M. & W. 639, the sale was of 50 tons of palm oil to arrive per *Mansfield*; in case of non-arrival or the vessel's not having so much in, the contract to be void. Only seven tons arrived in the vessel, and it was *held*, that the buyer was not entitled to these, since the contract was entire and the condition had not been fulfilled. In *Gorrisen v. Perlin*, 2 C. B. (N. S.) 681, the contract was for 1,170 bales of gambia, "now on passage from Singapore contained in two vessels" named. Upon their arrival it was found that the bales were too small according to the custom of the trade, so that the buyer was entitled to reject them. The Court *held*, that the words "now on passage" might be treated as a condition and the contract annulled, or they might be treated as a promise that the goods were actually on their way at the time the contract was made. It was *held*, that the words were not merely a condition, but amounted to a promise, for the breach of which an action could be brought. In this case the distinction between a warranty or promise on the one hand and a condition on the other is accurately observed. In *Hale v. Rawson*, 4 C. B. (N. S.) 85, where the contract was for the sale of goods "on arrival of" a named vessel, the only condition was the arrival of the vessel, and the seller was held liable when it arrived without the goods. In

dition is a kind of law or bridle annexed to one's act, staying or suspending the same and making it uncertain whether it shall take effect or not."⁴

§ 131. **Requisites of a Conditional Contract.** In order to create a true conditional contract, these five elements must exist:

1. The event to which the contract is related or made subordinate must be future.

2. The happening of that event must be uncertain.

3. The event must be possible.

4. It must not be unlawful.

5. Its occurrence must not be left to the arbitrary choice of the promisor.¹

(1) *Futurity.* If the event placed as a condition has already happened or failed to happen at the time the agreement is made, but the parties are ignorant of it, the fate of the contract is nevertheless fixed. It at once takes effect or is void, and there remains only a fact to be ascertained.²

the strict technical sense of the word, a condition exists when the obligation is made to depend upon a future event which may or may not happen. Pothier, *Oblig.* 199. A contract is conditional when it is made to depend upon a future and uncertain event, either by suspending it until that event happens or by rescinding it according as the event happens or not. Code Napoleon, art. 1168.

⁴ Shepherd's Touchstone, 117.

¹ Demolombe (*op. cit.*), ii, n. 294.

² In Dig. 12, 1, 37, it is said: "When a condition refers to the time at which the contract is made, the stipulation is not suspended, and if the conditional event is an actual fact, the stipulation is binding, even though the parties to the contract should not be aware that it is binding. * * * The rule is the same when the condition refers to past time." And in *Ibid.*, § 39, "accordingly the proviso only acquires the force of a condition when it is referred to a future time." (Monro.) In Institutes, 3, 15, 4, it is said: "A stipulation is conditional when performance is made to depend on some uncertain event in the future, so that it becomes actionable only on something being done or omitted; for instance, 'Do you promise to give five aurei if Titius is made consul?'" In Institutes, iii, 15, 6, it is said: "Conditions relating to past or present time either make the obligation void at once or have no suspensial operation whatever. Thus in the stipulation, 'Do you promise to give me so and so if Titius has

This rule does not apply to promissory conditions. Thus in the leading case of *Behn v. Barness*, the statement in the charter party that the vessel is "now in the port of Amsterdam" was treated as a condition, and yet the charterer was held to be liable because the vessel was not at that time in that port.³

(2) *Uncertainty*. The event must be of such a nature that it may or may not occur. An event which must happen, if placed as a condition, merely fixes the time of performance. This is the most characteristic requisite of a condition. An event that is certain either to happen or not to happen, cannot be a condition. The uncertainty merely as to the time when an event will occur, and consequently when a promise must be performed, does not render the promise conditional. So a promise to pay if A. dies is absolute. But a promise is conditional if it be uncertain whether the event will occur at all, for example, if a certain ship arrives, if my house is destroyed by fire, or, if it be uncertain whether an event which is bound to occur will happen before the occurrence of another event.

(3) *Possibility*. If the parties know that the event to which the contract is subordinated cannot happen, they intend to make a jest and not a contract, as if my promise be based upon your production of a mermaid or of a centaur. If they did not know, then, too, there is no contract, because if the event cannot happen, it is not uncertain. Thus, if I should agree to rent your house in case ghosts appear in mine, the contract is null. If the condition was possible when the contract was made, but became impossible of performance afterwards, then the question is not as to the original validity of the contract, but as to the non-fulfillment of the condition. It will be seen later that in some cases

been consul, or if Maerius is alive?" the promise is void if the condition is not satisfied; while, if it is, it is binding at once; for events which in themselves are certain do not suspend the binding force of an obligation, however uncertain we ourselves may be about them." (Moyle.)

³ 3 Best & Smith, 751. See *post*, as to promissory conditions.

the continuance of a possibility of performance is an implied condition in many contracts. If the condition be negative in form, not to do an impossible thing, and it appears that the parties intended to create a legal relation, the contract is valid and absolute at once.⁴

(4) *Legality*. If the event placed as a condition involves the doing by one of the parties of an act prohibited by law or against public policy or good morals, the contract is void for illegality.⁵ If it involves the not doing of a criminal act, there is no consideration for the counter-promise. So my promise to pay a sum of money if you take a false oath, or if you do not, is in either case invalid. But if the negative condition relates to a matter not actually criminal, the agreement is valid.⁶ So one may obligate himself to pay a certain sum if he takes to drink. This is the principle

⁴ Giorgi (*op cit.*), iv, n. 314, citing Institutes, 3, 19, 11, and Dig. 45, 1, 7. It may be well to mention that conditions are differently treated in the construction of wills. When the performance of a condition subsequent annexed to a devise has become impossible by the act of God, it is dispensed with and the estate vests absolutely in the devisee. *Ellicott v. Ellicott*, 90 Md. 321; 48 L. R. A. 58; *Merrill v. Emery*, 10 Pick. 511. In Roman law an impossible condition invalidates a contract, but in a testament it is deemed unwritten and the bequest is treated as absolute. Institutes, 2, 14, 10; Dig. 35, 1, 3.

⁵ *Lound v. Grimwade*, L. R. 39 Ch. D. 605. No action lies on a bond given in consideration of a party's doing something in violation of the patent law. *Duvergier v. Fellowes*, 1 Cl. & Fin. 39.

⁶ When defendant agreed not to publish any libel on the plaintiff promising to pay \$5,000 if he did so, and afterwards published an article charging plaintiff with bribing voters, it was held that the designated sum could be recovered. *Emery v. Boyle*, 200 Pa. 249. In consideration of his wife's dismissing a suit for divorce against him a husband covenanted not to consort again with a named mistress of his and agreed that if he did so, he would convey certain real estate to his wife. He did afterwards resume his relations with his mistress, and it was held, that the wife was entitled to specific performance of the agreement to convey the land. *Darcey v. Darcey*, 29 R. I. 384; 23 L. R. A. (N. S.) 886. In Dig. 45, 1, 121, it is said that in a marriage contract a stipulation by the husband to pay a sum if he takes a concubine is enforceable by the wife if he does so.

underlying the imposition of fines by associations on members who violate the by-laws.⁷

If the condition concerns the doing of an unlawful act by a third party it is valid, as in the case of burglar insurance.

A wager or bet as to the result of an election or any other uncertain event has all the elements of a valid conditional contract. Until the Nineteenth Century wagers were enforced by the Courts, but they have since been held to be void because against public policy.⁸

(5) *Arbitrary Choice*. The future event upon which the contract is conditioned must not be left to the arbitrary choice or caprice of the promisor, as where I agree to buy an article, *if I choose*. Such a condition prevents the creation of an obligation because it is a contradiction in terms to say that one is bound and yet retains the complete right not to be bound.⁹ But when the existence of the obligation is not left to the mere will of the promisor, but only a certain discretion or choice of time is given to him, then the condition is valid. This matter is discussed subsequently under the head of potestative conditions. It is sufficient to say now that this rule applies only to conditions precedent and not to conditions subsequent. A promise to sell an article if I choose is invalid, but the contract by which I have the right to buy it back if I choose, is valid, as a condition subsequent. The rule also does not apply to conditions that are to be performed on the part of the promisee, as in a contract by which a buyer agrees to purchase if he approves after trial. And a condition may be purely potestative on the part of a third person.

§ 132. **Subsidiary Conditions.** If the contract be absolute as to the chief part of the performance, but some acces-

⁷ Huc. Commentaire, col. vii, p. 332. The liability imposed upon members of associations by the by-laws is contractual in its nature. *Clarke v. Earl of Dunraven*, L. R. [1897] A. C. 59.

⁸ In *Wroth v. Johnson*, 4 H. & McH. 284, decided in 1799, the plaintiff was held to be entitled to recover a sum of money wagered on the result of an election for sheriff in Kent County, Maryland.

⁹ Giorgi (*op. cit.*), iv, n. 298.

sory or subsidiary matter be placed as a condition, then a failure of performance as to such subordinate matter does not defeat the contract. Thus in the case of a sale to take effect after a valuation to be fixed by a third party, if it was the intention of the parties that only that person should fix the price, there is no obligation unless he does so.¹ But when, according to the construction of the whole contract, the parties appear to have intended that if the named person should fail to fix the price, it should be ascertained in some other way, the condition will be treated as subsidiary, and not essential.² A lease giving to the lessee an option to purchase at its expiration, at a fair valuation by appraisement, means a fair market price to be ascertained by judicial methods if the parties do not agree.³

§ 133. **Condition and Consideration.** A condition in a contract does not take the place of a consideration. My promise to pay a certain sum for your horse if I find upon trial that it can trot a mile in three minutes, is not binding upon me, when I ascertain that fact, unless there is also the consideration of your promise to sell to me in that event. In *Sterling v. Sinnickson*¹ an action was brought on the following promise: "I, Senna Sinnickson, am hereby bound to Benjamin Sterling for the sum of \$1,000, provided he is not lawfully married in the course of six months from the date hereof." The Court said: "When the event upon which the obligation becomes payable is in the power of the obligee, and is to be brought about by his doing or not doing a certain thing, it cannot properly be called a contingency—it is rather the condition meritorious upon which the obligation is entered into, the moving consideration for which the money is to be paid. It is not, therefore, to be considered as a mere contingency, but as a consideration, and it must

¹ *Milner v. Field*, L. R. 5 Eq. 829.

² *Richardson v. Smith*, L. R. 5 Ch. 648; *Emery v. Wase*, 8 Ves. 505. See Fry, *Specific Performance*, § 365.

³ *Lister Chemical Works v. Selby*, 68 N. J. Eq. 278. Cf. *Joy v. St. Louis*, 138 U. S. 1.

¹ 5 N. J. L. 762.

be such consideration as the law regards." And the consideration was accordingly held to be void because against public policy.

The true owner of a horse demanded it from a man in possession, who surrendered it to the owner upon the condition that the latter would return it if a certain fortuitous event happened. That event did happen, but it was held that there was no consideration to support the owner's promise to give up his property.² So in a guarantee, where the promise of the guarantor to pay A's debt in case A should fail to do so at maturity, there must be a consideration for that promise given at the time it is made.³

§ 134. **Different Kinds of Conditions.** The most important distinction is between conditions precedent and conditions subsequent. When the happening or not happening of the event upon which the agreement is conditioned must precede the existence, or enforceability, of the obligation on the part of the promisor to perform, the condition is called precedent. In the civil law, this condition is called suspensive, because it is held to suspend the existence of the contract. When upon the happening or not happening of the future event, a contract, perfect or absolute, is liable to be rescinded in whole or in part in accordance with a term in the contract itself, the agreement is made upon a condition subsequent. In the civil law, this condition is called resolutory, because it resolves or discharges the contract upon a certain contingency. In Roman law, however, according to a more exact juridical analysis, a condition is always precedent or suspensive. A sale, for instance, with the right of re-purchase or return, was not a conditional contract, but an absolute one, which could be rescinded upon a condition. It was only the rescission which was subjected to a condition. The rescission might or might not happen, it is in suspense, and the condition, instead of being precedent to the actual sale, is precedent to its discharge.¹

² *Fink v. Smith*, 170 Pa. 124.

³ *Ante*. Part II, ch. 4.

¹ Demolombe (*op. cit.*) II, n. 278.

It is, however, no objection to our existing terminology that a condition subsequent is so called, although in its last analysis, and from one point of view, it is a condition precedent. Both conditions affect the agreement, the condition precedent before the duty to perform arises, and the condition subsequent afterwards by putting an end to the contract. Conditions are said to be concurrent when the liability of each party to perform depends upon some act to be done by the other at the same time. These are in effect precedent, since neither party can maintain an action without showing a performance or readiness to perform by him. Such conditions are chiefly implied or promissory.

Conditions are also divided into casual, potestative and mixed.² This classification has regard to the character or nature of the event upon which the contract is made to depend. When the future event is one not within the power of either of the parties to bring about, but depends upon accident, hazard or the act of a third party, the condition is casual, as in the case of fire and marine insurance or the sale of goods if a certain vessel arrives. A potestative condition is one which makes the obligation or performance of the contract dependent upon an event which it is within the power of one of the parties either to bring about or prevent. In our law, these conditions create what is often called an optional contract. A mixed condition is one depending partly upon the will of one of the parties, and partly upon the act of a third person, the former part being potestative and the latter casual, as if I should promise to pay you a sum of money in case you marry my niece.³

Conditions are also express or implied. They are express when formally stated in the contract as such, and implied when the law presumes that the parties intended to subordinate their agreement to them, or when they are an essential element of the particular contract.

² *Sin autem aliquid sub conditione relinquatur, vel casuali, vel potestativa vel mixta.* Codex, 6, 51, 7.

³ Pothier, oblig. n. 201.

§ 135. Parol Condition Suspending Written Instrument.

Although a writing which is in form an absolute and complete contract is duly executed, it may, nevertheless, be shown that, according to the agreement of the parties, it was not to become binding or be put in effect until the fulfillment of some condition precedent resting in parol.¹ Such evidence does not contradict or vary the writing, but goes to prove that the contract never came into existence by reason of the failure of the condition.

Most cases seem to hold, however, that when a deed of land, absolute in terms, is delivered to the grantee upon the express parol condition that it is only to take effect or be recorded upon the happening of a future contingency, such condition is invalid and the title passes at once to the grantee.² This ruling is based, either upon the ground that a deed cannot be delivered in escrow to the grantee himself, or upon the ground that evidence of the condition is an attempt to vary a written instrument by parol.

But certainly the true doctrine is that of other cases which hold that, as between the parties and those having notice, effect will be given to the parol condition, since the grantor did not intend to make an absolute delivery, and thus only

¹ *Ware v. Allen*, 128 U. S. 590; *Burke v. Dulaney*, 153 U. S. 228; *Michels v. Olmstead*, 157 U. S. 198; *Harrison v. Morton*, 83 Md. 456; *Belleville Bank v. Bornman*, 124 Ill. 200; *Juilliard v. Chaffee*, 92 N. Y. 535; *Reynolds v. Robinson*, 110 N. Y. 654; *Adams v. Morgan*, 150 Mass. 143; *Pattle v. Hornibrook*, L. R. [1897], 1 Ch. 25. (To the contrary is *Hurt v. Ford*, 142 Mo. 283; 41 L. R. A. 823.) So it may be shown that the agreement was that the contract should go into effect at some future time, *Davis v. Jones*, 17 C. B. 625, or at the option of one of the parties, *Harrison v. Morton*, 83 Md. 456, or in case a third person approved of it, *Pym v. Campbell*, 6 E. & B. 370; or another party signed it, *Elastic Tip Co. v. Graham*, 185 Mass. 600; or, in the case of a guarantee, that a proposed co-surety should join. *Evans v. Bremridge*, 8 DeG. M. & G. 100. It was held in *Jamestown*, etc., *College v. Allen*, 172 N. Y. 291, that a condition subsequent, dependent upon a contingency could not be shown by parol. It looks as if this ruling allowed a fraud to be practiced in that case.

² *Wipfler v. Wipfler*, 153 Mich. 18; 16 L. R. A. (N. S.) 941; *Hubbard v. Greeley*, 84 Me. 340; 17 L. R. A. 511; *Branan v. Bingham*, 26 N. Y. 491; *Wadsworth v. Warren*, 12 Wall. 313; *Newman v. Baker*, 10 D. C. App. 187.

can the Court prevent the perpetration of a fraud upon him or the abuse of his confidence.³

§ 136. **Performance of Conditions Precedent.** A condition precedent must be performed, or the event placed as a condition must occur, in such manner and at such time as the parties intended, according to the true construction of their agreement. Until that is done, the rights and obligations of the parties are in suspense; and if it be not done as stipulated, the contract is at an end.¹ When the condition is duly fulfilled, the contract is treated as absolute from the time it was made, subject to the qualifications mentioned hereafter concerning the risk of loss or deterioration of the subject-matter *pendente conditione*.

The formula of a conditional contract is not, "I will promise if *x* happens," but, "I do promise if *x* happens." It is not an agreement to create an obligation in the future. It is a contract which, according as the condition is fulfilled or fails, exists or did not exist from the time it was made.²

If the condition is conjunctive, providing that two or more things must happen, then both must concur before the obligation arises, as in the case of a sale of goods to arrive by or on arrival by a named vessel, when the arrival both of the goods and of the vessel is the condition.³ If the condition be disjunctive, it is fulfilled when either one of the two events designated occurs. A promise to do a certain thing or if it be not done, to pay a sum of money or do some other thing, is not a conditional contract, but is either an obligation with a penal clause or an alternative contract.⁴

Illustrations. When the lease of a house and lot provides that it shall not be binding on the lessee until he is appointed railroad freight agent at a certain station, it means that

³ *Wilson v. Wilson*, 158 Ill. 567; *Elliott v. Murray*, 225 Ill. 107; *Lee v. Richmond*, 90 Iowa, 695; *Kenny v. Parks*, 137 Cal. 527.

¹ See cases in § 141 as to preventing performance of condition.

² Failure to perceive this principle has resulted in some erroneous decisions, such as that in *Newton v. Newton*, cited *post*, § 146.

³ *Idle v. Thornton*, 3 Camp. 274; *Lovatt v. Hamilton*, 5 M. & W. 639.

⁴ See the next two chapters.

it is not binding upon either party until that event happens, and, therefore, the lessee cannot enforce it unless so appointed.⁵

A. agreed to sell a certain quantity of coal to B. provided a railway company delivered the same to A. in a designated month according to its contract. This delivery was not made until long after the time stipulated, and then by way of accord and satisfaction between A. and the railway company for the latter's breach of contract. B. claimed that he was then entitled to the coal. It was held that since the railway company had failed to deliver the coal to A. at the time agreed upon, the condition of his contract with B. was not performed, and that both parties were then free from any obligation under the contract, since the condition was not for the benefit of either party to the exclusion of the other.⁶

Where parties promised to deliver goods at a future time "if we have the wares to sell at that time," they are under no obligation unless that condition be fulfilled.⁷ If a man promises to pay for work on a building, to be done in such manner as may be directed by a third person, no action lies on the promise if the direction be not given.⁸ An agreement to buy from A. certain land if A. should obtain it from a third party, creates no obligation unless A. does purchase it.⁹

If the obligation of a tenant to keep certain demised buildings in repair is conditioned upon the landlord's first putting them in repair, the latter cannot recover for the tenant's failure to repair any part without having himself first repaired the whole.¹⁰

When a lease for twenty-one years gives to the lessee the right to determine it at the end of seven years, provided

⁵ *King v. Warfield*, 67 Md. 246.

⁶ *Neldon v. Smith*, 36 N. J. Eq. 155.

⁷ *Peerless Glass Co. v. Pacific, etc., Co.*, 121 Cal. 641.

⁸ *Earl of Darnley v. London C. & D. R. Co.*, 3 DeG. J. & S. 24.

⁹ *Wylson v. Dunn*, 34 Ch. D. 569; *Canton Co. v. Balto. & Ohio R. Co.*, 79 Md. 430.

¹⁰ *Neale v. Ratcliff*, 15 Q. B. 916.

he has paid the rent and performed the other covenants, he cannot terminate the lease at that time if he has not performed the covenants.¹¹

When the promise is to pay a certain note if the holder cannot collect it from the maker, no action lies on the promise without proof that the holder could not collect the amount of the note from the maker.¹²

A subscription to the erection of a building or to the construction of a railroad, if made conditional upon the completion of the work by a certain time, is not binding unless the condition is strictly fulfilled.¹³

When the condition of a fidelity bond is that the employee shall sign it, which was not done, the condition is not waived by the obligor's renewal of the bond in ignorance of the fact that the employee had not signed it.¹⁴

The provision in a policy of fidelity insurance that before the company shall be liable the insured shall use diligence in prosecuting the employee, is a valid condition precedent, and a failure to do so when required is a bar to an action on the policy.¹⁵ The Court said, that what the parties declare to be a condition should receive effect "unless it shall appear either so capricious and unreasonable that a Court of law ought not to enforce it, or to be *sua natura* incapable of being made a condition precedent."

If the right of a tenant to renew his lease depends upon his prior performance of a certain covenant, he cannot be relieved from the consequence of his failure to perform that covenant, which is a condition precedent.¹⁶

§ 137. Condition as to Vesting of Title. "Conditional Sales." When a contract of sale provides that the title and ownership of the thing sold, although it is delivered to the

¹¹ *Friar v. Gray*, 5 Exch. 597; 4 H. L. C. 565.

¹² *Ordeman v. Lawson*, 49 Md. 139.

¹³ *Ogden v. Kirby*, 79 Ill. 555; *Cincin., etc., R. Co. v. Bensley*, 51 Fed. Rep. 738; *Dalrymple v. Lauman*, 23 Md. 376; *Scarlett v. Academy of Music*, 46 Md. 132.

¹⁴ *Union Ins. Co. v. U. S. Fidelity Co.*, 99 Md. 422.

¹⁵ *London Guarantee Co. v. Fearnley*, L. R. 5 App. Cas. 911 (1880).

¹⁶ *Greville v. Parker* [1910], App. Cas. 335.

purchaser, shall not vest in him until payment of the price, the transaction is generally called a conditional sale. Most cases give full effect to this so-called condition and hold, not only that the buyer acquires no title until payment is fully made, but also that he cannot transfer a title even to a *bona fide* purchaser for value.¹ The ruling of other cases is that, although the agreement as to the title is valid between the immediate parties, it is not enforceable against one who buys the property from the conditional vendee, and that such purchaser is not bound by the condition, unless he has actual knowledge of it.²

It would seem to be clear that such a sale is not in reality based upon a condition. The future event upon which the passing of the title is made to hang, is not uncertain, as depending upon chance or the option of either party, and is, therefore, neither a casual nor a potestative condition. That future event is merely the performance of the buyer's absolute promise to pay. He cannot return the article or rescind the contract. Nor is the future event even such as to constitute a promissory condition, or a dependent promise. The seller has already delivered the goods, and consequently the promise of the buyer to pay is not conditioned upon the

¹ *Harkness v. Russell*, 118 U. S. 663; *Segrist v. Crabtree*, 131 U. S. 287; *Bierce v. Hutchins*, 205 U. S. 340; *Brown v. Fitch*, 43 Conn. 513; *Rodgers v. Bachman*, 109 Cal. 552; *Gill v. De Armant*, 90 Mich. 430; *Carter v. Kingman*, 103 Mass. 517; *Wentworth v. Woods Machine Co.*, 163 Mass. 28; *Ballard v. Burgett*, 40 N. Y. 314. As to the rights and liabilities of the parties generally when the contract is only partly performed, see note to *Cole v. Hines*, 32 L. R. A. 455. As to the measure of damages in an action by the conditional vendor against third parties who acquire the property, see *Davis v. Bliss*, 187 N. Y. 77; 10 L. R. A. (N. S.) 458. When a statute provides that the buyer may redeem, notwithstanding a default in payment of instalments, a contract waiving this right and agreeing that upon any default the seller may retake the goods is against public policy and void. *Dessau v. Holmes*, 187 Mass. 417.

² *Lincoln v. Quynn*, 68 Md. 299; *Stadtfeld v. Huntsman*, 92 Pa. 53; *Michigan C. R. Co. v. Phillips*, 60 Ill. 190. As to when a purchaser from a conditional vendee is put upon inquiry as to the retention of title by the original seller, see *Central Trust Co. v. Arctic Ice Co.*, 77 Md. 202.

previous performance of a counter-promise, but it is an independent promise.³ Such a sale with reservation of title is in effect a chattel mortgage, or an agreement to create a lien, which is of no avail against third parties, who take the property without notice.⁴ In some States, statutes now provide that the seller cannot enforce his right to the goods sold as against third parties unless the agreement or a chattel mortgage be recorded.⁵ This so-called conditional sale is to be distinguished from the bailment or hire of a chattel with an option on the part of the bailee to buy, which is a contract subject to a potestative condition.⁶

Risk of Loss. When the question arises as to who should bear the risk of loss in case the article sold is destroyed or damaged before the price is paid, the decisions of those Courts which hold that the sale is a conditional contract float between two opposite views. One view is that the loss follows the title, and hence falls upon the seller, since he was the owner according to the terms of the agreement.⁷ But other Courts in case of a loss disregard the supposed condition and hold that since the purchaser's promise to pay

³ In *Andrews v. Col. Savings Bank*, 20 Col. 313, it was held that the optional payment of the purchase price is essential to the creation of a conditional sale, and that when the agreement imposes an absolute liability upon the buyer to pay for the property delivered, the transaction, whatever name be given to it by the parties, is in legal effect an absolute and not a conditional sale. Somewhat similar conclusions were reached, upon the construction of particular contracts, in *Osborn v. South Shore Lumber Co.*, 91 Wis. 526; *Forsman v. Mace*, 111 La. 28; *Osborne, etc., Co. v. Connor*, 4 Kan. App. 609.

⁴ *Textor v. Orr*, 86 Md. 392.

⁵ *Harling v. Creech*, 88 Tex. 300; *Perry v. Young*, 105 N. C. 463; *Case Co. v. Garven*, 45 Ohio, 289.

⁶ See *post*, § 145.

⁷ *Bishop v. Minderhout*, 128 Ala. 162; 52 L. R. A. 395; *Randall v. Stone*, 77 Ga. 501. In *Tabbut v. Am. Ins. Co.*, 185 Mass. 420, it was held that after the property was burned the buyer was no longer bound by his promise to pay, since the parties contemplated, as a condition of performance by each, the continued existence of the thing sold, and that consequently he could only recover from an insurance company the amount of instalments paid by him.

was absolute, and the article was under his control, the loss falls on him.⁸

§ 138. **Act or Approval of Third Party as Condition.** When the contract provides that the existence or the extent of the promisor's liability shall be determined by some third person, that constitutes a condition, and, as a general rule, the Courts have no power to dispense with it, since to do so would be to make a different contract for the parties.¹ Thus, if goods be sold for a price to be fixed by a designated person, the contract is avoided if that person does not name a price.² When the consent of a certain person is required for the execution of a power, that condition must be strictly complied with, and if that person dies before giving his consent, the power is gone.³

If the agreement for the purchase of land stipulates that the title shall be satisfactory to the attorney or conveyancer of the purchaser, his decision is final, provided he acts in good faith, and the condition is not dispensed with by showing that the title is satisfactory to other persons.⁴ But the ruling of some Courts is that the decision of the purchaser's

⁸ *Lavelley v. Ravenna*, 78 Vt. 152; 2 L. R. A. (N. S.) 97; *Am. Soda Fountain Co. v. Vaughn*, 69 N. J. L. 582; *Tufts v. Griffin*, 107 N. C. 47; 10 L. R. A. 526; *Marion Mfg. Co. v. Buchanan*, 118 Tenn. 238; 8 L. R. A. (N. S.) 591.

¹ *Kihlberg v. U. S.*, 97 U. S. 398; *U. S. v. Gleason*, 175 U. S. 588; *Gill v. Vogler*, 52 Md. 663; *Wilson v. York, etc., R. Co.*, 11 G. & J. 58.

² *Firth v. Midland R. Co.*, L. R. 20 Eq. 100; *Bridgend, etc., Co. v. Dunraven*, L. R. 31 Ch. D. 219; *Norton v. Gale*, 95 Ill. 533; *Preston v. Smith*, 67 Ill. App. 613; *Sale of Goods Act*, art. 8.

³ *Powles v. Jordan*, 62 Md. 503.

⁴ *Church v. Shanklin*, 95 Cal. 626; 17 L. R. A. 207; *Gilson v. Cambridge Savings Bank*, 180 Mass. 447; *Thompson v. Dickerson*, 68 Mo. App. 535; *Watts v. Holland*, 86 Va. 999; *Lieberman v. Beckwith*, 79 Conn. 317; *Hollingsworth v. Colthurt*, 96 Pac. 857; 18 L. R. A. (N. S.) 741. When a contract for the sale of a parcel of land provides that a covenant, which shall be satisfactory to the vendor, restricting the sale of liquor on the land, shall be inserted in the deed, and the vendor, acting in good faith, on the advice of his counsel refuses to execute a deed tendered to him on the ground that the language of the restrictive covenant therein contained is not satisfactory to him, his determination is conclusive. *Goldberg v. Feldman*, 108 Md. 330.

solicitor as to the title must be reasonable, *i. e.*, correct in the opinion of the Court, and if it be shown that the title is reasonably free from doubt, the condition will be dispensed with.⁵

A railroad company agreed to purchase of B. large quantities of coal, to be delivered daily and to be of such quality as should be satisfactory to the company's master of transportation and master of machinery; the deliveries to commence on a certain day and to continue for three years. After a considerable quantity of coal had been delivered, the company refused to receive any more because it had been condemned as unsatisfactory by its masters of machinery and transportation. In an action by B. to recover damages for breach of the contract, it was held that while the decision of the question of acceptance was committed to the judgment of the designated persons, the law required them to exercise a fair, just and honest judgment on the subject, and if they made their decision against the coal in good faith, the defendant was justified in refusing to accept it, but if they fraudulently rejected it, their judgment would be no excuse to the defendant, and also that they could not reject the coal once for all so as to deprive the plaintiff of the right to make subsequent tenders of it.⁶

Architect's certificate. When a contract for the erection of a building or the doing of other work provides that payment shall not be made until the architect, engineer or some other person certifies that the work has been done in conformity with the specifications of the contract, the giving of the certificate is a condition precedent to the right to demand the price, unless its refusal was fraudulent, or the result of such a gross mistake on the part of the architect or other person as necessarily to imply bad faith. It is not suf-

⁵ Hudson *v.* Buck, 7 Ch. D. 683; Low *v.* Stephens, 1 Y. & Collyer, 222; Vought *v.* Williams, 120 N. Y. 253. But compare Flannagan *v.* Fox, 144 N. Y. 706. These cases make a different contract for the parties. Questions as to the performance of contracts made subject to the approval or satisfaction of one of the parties are discussed subsequently under the head of "Potestative Conditions."

⁶ Balto. & Ohio R. Co. *v.* Brydon, 65 Md. 198.

ficient to show that it ought in reason to have been given and thus substitute the opinion of a jury for that of the architect.⁷

The view in some jurisdictions, however, seems to be that an "unreasonable" withholding of the certificate by an architect is an excuse for its non-production.⁸

When the contract provided that certain monthly payments were to be made upon the certificate of an engineer whose determination was to be conclusive, it was held that the certificate was a condition precedent, in an action at law, in the absence of fraud or such gross mistake as to imply bad faith, and that it was not sufficient to show that the engineer was incompetent or negligent.⁹

But if such third person was deceived by the defendant, or if his refusal to give the certificate was prompted by the defendant, his decision is not final.¹⁰ On the other hand, acceptance of the work by the architect is not conclusive as

⁷ *Sweeney v. U. S.*, 109 U. S. 618; *Martinsburg, etc., Co. v. March*, 114 U. S. 549; *Lynn v. Balto. & Ohio R. Co.*, 60 Md. 404; *Chism v. Schipfer*, 51 N. J. L. 1; 2 L. R. A. 544; *Fulton v. Peters*, 137 Pa. 613; *Lake View v. MacRitchie*, 134 Ill. 203; *Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. App. 597.

⁸ *Nolan v. Whitney*, 88 N. Y. 648; *Bowery Nat. Bank v. New York*, 63 N. Y. 336. In *N. Y. Sprinkler Co. v. Andrews*, 173 N. Y. 25, it is said that such a contract is subject to the qualification "that the certificate should not be unreasonably or arbitrarily refused, and the issuance of it should not be prevented by the act or default of the defendant." In this case the contract for the erection of an automatic sprinkler system provided that the price should be payable after the issue of a certificate of approval by the Board of Fire Underwriters. The work was done according to the contract, but the certificate was refused because the water supply was insufficient and the premises were not favorably located. It was held that the plaintiff company was entitled to recover, because it had nothing to do with the cause of the refusal. In *White v. Abbott*, 180 Mass. 99, it was held that the condition as to the approval of the architect is binding unless the certificate is fraudulent or the "result of palpable mistake." The architect may also be made the sole interpreter of the true meaning of the specifications. *Norcross v. Wyman*, 187 Mass. 25.

⁹ *Chicago & Santa Fe R. Co. v. Price*, 138 U. S. 185.

¹⁰ *Teal v. Bilby*, 121 U. S. 572; *Whelen v. Boyd*, 114 Pa. 226; *Michaelis v. Wolf*, 136 Ill. 68.

to the performance of the contract by the builder, unless under the agreement, the certificate was to be conclusive on both parties.¹¹ When the contract merely provides that before demanding payment, the builder shall obtain a certificate by the architect, but does not provide that it shall be final between the parties, the owner may show that the contract was not complied with, although the architect has given a certificate that it was.¹²

When an architect declares that he would not, on account of another controversy, give to the builder a certificate for certain extra work which had been ordered and done in conformity with the terms of the contract, the builder may recover therefor without a certificate.¹³ And if the architect refuses to give a certificate based on his personal examination, it is dispensed with.¹⁴

Under some circumstances, it has been held that the production of a certificate by the architect has been waived or that the conduct of the landowner has been such as to estop him from treating it as a condition precedent.¹⁵ When the certificate has been withheld in good faith by the architect, and its production has not been waived, the builder cannot recover the contract price because the condition of the promise to pay that price has not been fulfilled, but the builder may recover on "*quantum meruit* for the value of his work, when he has substantially performed the contract."¹⁶

The rule that the condition is dispensed with when the architect acts fraudulently or in bad faith in giving or refusing to give a certificate of approval, does not make a different contract for the parties, for it may fairly be assumed that they both intended that he should exercise an honest

¹¹ Wyckoff v. Meyers, 44 N. Y. 143; Glacius v. Black, 50 N. Y. 146; Kennedy v. Poor, 151 Pa. 472.

¹² Mercantile Trust Co. v. Hensey, 205 U. S. 298.

¹³ Filston Farm Co. v. Henderson, 106 Md. 336.

¹⁴ Aetna Indemnity Co. v. Fuller Co., 111 Md. 321.

¹⁵ Filston Farm Co. v. Henderson, 106 Md. 336; Pope v. King, 108 Md. 37; 16 L. R. A. (N. S.) 489, with note as to when acceptance of a building is a waiver of the provisions of the contract.

¹⁶ See *post*, Part vi, ch. 3.

judgment, and that the condition should be disregarded if he failed to do so, although both parties take the risk of a mere mistake or error of judgment on his part. It should also be implied that the death or the disability of the named architect before the time comes for him to act, discharges the condition.

Refusal of third person to act. It has been seen that in the case of a sale at a price to be fixed by a third party, that party's refusal to act avoids the contract.¹⁷ In such cases, the contract is executory on both sides and it may properly be considered that the parties did not intend to be bound unless the condition was fulfilled. But when the contract has been executed on one side and the act of a third party is placed as a subsidiary condition of the liability or as evidence of the extent of the liability on the other side, it may well be considered that the refusal of that party to act at all should be treated in the same way as his failure to exercise an honest judgment and thus has dispensed with the condition. When an architect refuses to give a certificate based on his personal examination, it has the same effect as his refusal in bad faith, to give any certificate at all and discharges the condition.¹⁸

It is generally held, however, in insurance contracts, that when the certificate of a magistrate or other person as to certain facts is required as a condition of liability of the insurer, that the refusal of such person to give the certificate is not an excuse for its non-production.¹⁹ But it has been ruled that the condition in a policy of fire insurance requiring the insured to furnish appended to his proof of loss, a certificate of the fire marshal that he sustained the loss honestly, is void because the officers of the fire depart-

¹⁷ Note 2, *supra*.

¹⁸ *Aetna Indem. Co. v. Fuller Co.*, 111 Md. 323, 344.

¹⁹ *Columbian Ins. Co. v. Lawrence*, 10 Peters, 512; *Andette v. L'Union St. Joseph*, 178 Mass. 115; *Johnson v. Phoenix Ins. Co.*, 112 Mass. 49; *Roumage v. Mechanics' Ins. Co.*, 13 N. J. L. 110; *Lane v. St. Paul Ins. Co.*, 50 Minn. 230; 17 L. R. A. 199.

ment are not compellable to **certify** to facts connected with losses.²⁰

Failure of arbitration. When a policy of fire insurance provides that the amount of the loss thereunder shall be ascertained by an appraisement, each of the parties appointing one appraiser who are to select an umpire and that no action shall be brought on the policy until after such appraisement, then if the insured appoints an appraiser in good faith, but no appraisement is made because the two appraisers fail to agree on an umpire, a selection being prevented chiefly by the appraiser of the insured, such failure to obtain an appraisement of the loss being without the fault of the insured himself, is not a bar to his right to sue on the policy.²¹

§ 139. **Notice of Fulfillment of Condition.** Upon the occurrence of the event on which a promise is based, it is not necessary that notice thereof be given and demand of performance made unless that be required by the contract or may fairly be implied from its terms.¹ "When a party contracts to do a certain thing in a certain specific event, with which he can make himself acquainted, he is not entitled to

²⁰ *Universal Ins. Co. v. Block*, 108 Pa. 535. This case was overruled in *Kelly v. Sun Fire Office*, 141 Pa. 10. See *ante*, § 133, as to impossible conditions, and *cf.* *Agricultural, etc., Co. v. Bemiller*, 70 Md. 400. In *Noonan v. Hartford F. I. Co.*, 21 Mo. 81, a distinction is drawn between an absolute refusal of the officer to certify and his furnishing a certificate in which he alleges his inability to come to a conclusion.

²¹ *Connecticut, etc., Ins. Co. v. Cohen*, 97 Md. 294; *Shawnee Ins. Co. v. Pontfield*, 110 Md. 353. See note on arbitration as a condition precedent to action on insurance policy appended to the case of *Graham v. German Am. Ins. Co.*, 15 L. R. A. (N. S.) 1055. If the contract only requires the parties to choose appraisers once and those appointed fail to agree, it is not necessary that they should choose others and the condition is discharged. *Niagara Ins. Co. v. Bishop*, 154 Ill. 9; *Lancashire Ins. Co. v. Lyon*, 124 Ill. App. 491; *Chapman v. Rockford Co.*, 89 Wis. 572; 28 L. R. A. 405. *Contra*, *Westenheaver v. G. A. Ins. Co.*, 113 Iowa, 726.

¹ *Torrens v. Walker* [1906], 2 Ch. 166; *Bell & Co. v. Antwerp, etc., Line* [1891], 1 Q. B. 103; *Manchester Warehouse Co. v. Carr*, L. R. 5 C. P. D. 507.

any notice unless he stipulates for it, but when it is an event which lies within the peculiar knowledge of the opposite party, then notice ought to be given him."² If the contract or its rescission depends upon the will of one of the parties, notice of the exercise of his option is generally necessary.³ Insurance contracts provide in express terms that notice must be given within a designated time of a loss under the policy. Bonds conditioned for the honesty of employees require prompt notice of default to be given to the surety.⁴ When the vendor of land has the right to declare the contract void if certain things are not done by the purchaser and no time is fixed for doing them, he must give reasonable notice of his intention to claim the forfeiture.⁵

§ 140. **Waiver of Conditions.** A technical condition, that is, a condition other than a promise to do a certain thing or a warranty that a certain event has taken place, or will take place—a promissory condition—cannot, as a rule, be waived by one of the parties so as to make the contract enforceable against the other, since the latter has agreed to be liable only in case the event placed as a condition happens.¹ But if both parties treat the condition as having been fulfilled, their conduct may be such as to estop them to assert the contrary, or they may be considered as making a new contract dispensing with the condition. Thus when a buyer has the right to return an article in case a certain report of a referee be made, if he returns it, although that report was not made, and it is accepted by the seller, the condition is waived.²

When the condition is designed for the benefit of one of the parties only, that party may waive it and the rest of the

² Lord Abinger in *Vyse v. Wakefield*, 6 M. & W. 452, affirmed in 7 M. & W. 126.

³ See *post*, § 146.

⁴ *Fidelity & Dep. Co. v. Courtney*, 186 U. S. 342.

⁵ *Treat v. Detroit U. Rys.*, 157 Mich. 320.

¹ *King v. Warfield*, 67 Md. 246; *Neldon v. Smith*, 36 N. J. Eq. 155.

² *Avery P. Co. v. Peck*, 80 Minn. 519. When a lease provides that the tenant shall have the right to renew it upon giving three months' notice in writing, the lessor waives this condition by accepting an oral notice. *McClellan v. Rush*, 150 Pa. 57.

contract is then obligatory on both. A stipulation in a contract for the sale of land that the title shall be good may be waived by the purchaser, since it was for his benefit, although the vendor may desire to insist upon the condition as a ground of discharge for himself.³ Defendant bought certain land from the plaintiff, and also agreed to buy an adjoining lot if the plaintiff could convey a clear title to it. Third parties then had certain easements in this adjoining land, but defendant took possession of all the property and exercised acts of exclusive ownership for ten years. It was held that the defendant had waived the condition as to the title, and that the plaintiff should have a decree for specific performance with interest on the purchase money from the date of possession.⁴ When a building contract makes the certificate of the architect a condition of the liability of the owner for the contract price, he may waive the condition. Taking possession of the building and making no objection to the work for more than a month and promising to pay is evidence of a waiver of the certificate.⁵

When, upon the sale of a house, payment of taxes by the vendor is a condition precedent, if the purchaser accepts possession without requiring such payment, he cannot rescind the contract on account of non-performance of the condition, but is only entitled to an action to recover the amount of the taxes.⁶ If one party accepts performance of a contract by the other with knowledge that a condition precedent has not been fulfilled, he cannot afterwards rely upon the non-fulfillment as avoiding the contract.⁷ Promissory conditions are those that are generally susceptible of being waived.

§ 141. **Preventing Performance of Condition.** If one party prevents the occurrence of the event upon which his promise is conditioned, he violates an implied obligation. In such

³ *Bennett v. Fowler*, 2 Beav. 302. See also, *Hawksley v. Outran* [1892], 3 Ch. 376; *Fry on Specific Performance*, § 374.

⁴ *Canton Co. v. Balto. & Ohio R. Co.*, 79 Md. 424.

⁵ *Steelman v. Ludy*, 77 N. J. L. 446.

⁶ *Bechtel v. Cone*, 52 Md. 698.

⁷ *Carter v. Scargill*, L. R. 10 Q. B. 564.

case the condition is dispensed with, and he is liable in the same manner as if the event had happened.¹ Thus, if one who has agreed to pay for work upon the production of an architect's certificate induces the architect to withhold it, the condition is discharged.² The refusal to allow a contractor to go on with the work relieves him from the duty of procuring the certificate of an engineer made by the contract a condition of payment.³

When one agrees to pay a sum of money if and when he collects a certain judgment, which he holds, his assignment of the judgment to a third party will be treated as dispensing with the condition and his promise to pay becomes absolute.⁴ If the performance of a condition for the valuation of an article by third persons be rendered impossible by the act of the buyer, the price of the things sold may be fixed by the jury on a *quantum valebat*.⁵ Where a recognizance was given for the appearance in Court of a certain person, it is a defense to an action thereon that that person was prevented from appearing by his arrest and imprisonment in another county of the State, that being the act of the obligee.⁶

A. agreed by letter to repurchase certain bonds then sold by him to B. at any time within three years. Before the expiration of that time, B. notified A. that he wished to return the bonds and asked where they should be sent. A.

¹ *Rumsey v. Livers*, 112 Md. 546. *Quicumque sub conditione obligatur curaverit ne conditio existeret, nihilo minus obligatur*. Dig. 45, 1, 85, 7. The condition of an arbitration bond was to abide by the performance of the award. The obligor revoked the authority of the arbitrators, and it was resolved that since by his own act he had made the condition of the bond impossible to be performed, "his bond is become single and without the benefit or help of any condition." *Vynior's Case*, 8 Coke. 81 b, followed in *Union Ins. Co. v. Central Trust Co.*, 157 N. Y. 633; 44 L. R. A. 227. See generally as to preventing performance of condition, *Brown v. Rasin Monumental Co.*, 98 Md. 1; *Vreeland v. Vetterlein*, 33 N. J. L. 249; *Sibbold v. Bethlehem Iron Co.*, 83 N. Y. 378.

² *Smith v. Alker*, 102 N. Y. 87; *Rosenstock v. Ortwine*, 46 Md. 388.

³ *Smith v. Wetmore*, 167 N. Y. 234.

⁴ *Rumsey v. Livers*, 112 Md. 546.

⁵ *Humaston v. Telegraph Co.*, 20 Wallace, 28.

⁶ *People v. Bartlett*, 3 Hill (N. Y.) 571.

replied that he did not remember the agreement, but asked for a copy of it, and said that he always kept his contracts. B. sent him a copy of the agreement, to which A. made no reply until after the expiration of the three years, when he refused to make the repurchase. This conduct on the part of A. prevented B. from making a formal tender within three years, and, therefore, the condition as to time was dispensed with.⁷

By a contract based on the consideration of one hundred dollars, A. agreed that he would transfer to B. certain shares of stock at any time before a day named upon the demand of B. and payment of a certain sum. Before the day fixed, B. repeatedly endeavored to find A., having with him the required amount to pay for the shares, but was unable to do so. At the expiration of the time limited, A. refused to make the transfer. These facts were held to be an excuse for the failure of B. to make the demand and tender within the time limited.⁸

This rule is not applicable if one party has a right to do that which prevents the other party from performing the condition. If you are entitled to return to me an article sold to you under a potestative condition subsequent, I can lawfully prevent your doing so by the seizure and sale of the article under an execution.

§ 142. **Conditions Subsequent.** When it is stipulated that upon the happening of a future event, the contract shall be rescinded in whole or in part, the condition is called subsequent. Such condition does not suspend the execution of the agreement which was enforceable from the time when made, but effects a revocation of it upon the occurrence of the given event. A condition subsequent is an accessory stipulation, which adds to an agreement creating an obliga-

⁷ *Pierce v. Lukens*, 144 Cal. 397.

⁸ *Guilford v. Mason*, 22 R. I. 422. See also, *Connolly v. Haggerty*, 65 N. J. Eq. 596, where one party purposely kept out of the way.

tion, another agreement designed in a certain contingency to put an end to that obligation.¹

Contracts giving to the seller a right to repurchase the thing sold at a future time or to the buyer a right to return it are typical conditions subsequent.² When goods are sold on credit a stipulation that the seller may rescind the sale and re-take them if the price be not paid is a valid condition subsequent.³

The contract for the sale of a vessel stated that it was made "upon the express condition" that the boat should not be run upon certain waters within ten years. The seller sued to recover the damages suffered by him, which were in excess of the value of the boat, in consequence of a breach of this stipulation. It was held that the contract created a condition and not a covenant; that a covenant will not arise unless there be an agreement or promise for the performance or non-performance of some act. "The vendee took the property subject to the right which the law reserved to the vendor of recovering it upon breach of the condition specified. The vendee was willing to risk the loss of the steamboat when such breach occurred, but not to incur the personal liability which would attach to a covenant on his part that he would not use or permit others to use the boat on the prohibited waters."⁴

Conditions subsequent are frequently potestative on the part of one of the parties, and are sometimes implied rather than expressed. These instances are considered in subsequent sections. Stipulations in a contract for the sale of goods relating to the price at which they may be resold to others, or as to the use that may be made of them, are often

¹ Code Napoleon, Art. 1183, gives this definition: "A resolatory condition is that which, when it happens, effects a revocation of the contract, and puts the things back in the same situation as if the obligation had never existed. It does not suspend the execution of the contract; it only obliges the creditor to restore what he has received in case the event upon which the condition is based occurs."

² See post, § 146.

³ *Monitor Drill Co. v. Mercer*, 163 Fed. Rep. 943; 20 L. R. A. (N. S.) 1015; *Cole v. Hines*, 81 Md. 476.

⁴ *Hale v. French*, 104 U. S. 261.

spoken of as conditions annexed to the sale. But, ordinarily, these stipulations are not true conditions, since they do not operate to rescind contracts already made. The question in these cases is usually as to the legality of such agreements as affecting the freedom of trade. The general rule is that a condition restraining the alienation of a chattel and providing for a reverter, in case of a breach of the condition, is void, because in restraint of trade unless the article be one made under a patent or copyright.⁵

Conditions subsequent are often found in deeds which declare the purpose for which the land is conveyed or provide for a reverter if the land be diverted to other uses, or for a forfeiture in case certain things are done or are not done.⁶ A contract between a father and his two sons provided that in consideration of the conveyances to them of a farm, they would each build and settle on the land and jointly support their father for life, and that if they failed to comply with any of the provisions of the agreement, the whole should be null and void. It was held that upon the failure of either grantee to perform the condition, the conveyance was avoided.⁷

§ 143. **Potestative Conditions. Optional Contracts.** When the future event upon which the existence or discharge of the obligation is dependent, is one which the agreement leaves to the will or choice of one of the parties to bring about or to prevent, the condition is called potestative, because within his power (*potestas*). In other words, it is optional with him to create or destroy. If the future event depends upon the will or choice of a third party, the condition is not potestative, but is casual. The performance of a condition, either precedent or subsequent, may be committed to the mere will of the promisee, but it is only a condition subse-

⁵ *Park & Sons Co. v. Hartman*, 153 Fed. Rep. 24; 12 L. R. A. (N. S.) 136.

⁶ *Earle v. Dawes*, 3 Md. Ch. 167 and note; *Kilpatrick v. Baltimore City*, 81 Md. 179; *Phillips v. Insley*, 113 Md. 341.

⁷ *Epperson v. Epperson*, 108 Va. 471. See post as to implied condition of support.

quent that can validly be made dependent upon the arbitrary choice of the promisor.

Conditions potestative on the part of the promisor. It may seem strange to call that agreement a contract when a party makes his obligation dependent upon his own pleasure or will, since he reserves the right to discharge himself. But there are certainly some valid contracts whose efficacy does, nevertheless, depend to some extent upon the choice of the promisor, such as sales on trial or approval.

A difference in the character and form of these conditions is to be noted:

(a) *Arbitrary choice (merum arbitrium).* An agreement is void when its efficacy is made to depend upon a condition absolutely potestative on the part of the promisor. It is contrary to the essence of a contract that it should depend merely and wholly on the will or caprice of him who is supposed to have contracted. As if I should promise to pay a sum of money or to deliver a thing *if I choose*.¹

Whether a promise to pay or perform *if I think it reasonable, or if I find it convenient*, creates a purely potestative condition, rendering the obligation void, since it is equivalent to the condition *if I choose*, or whether it is to be construed as meaning, *when it is reasonable or convenient*, and so making valid the condition, is the subject of different views. The predominant opinion is that the condition is wholly arbitrary and hence destructive of the obligation, since the promisor manifestly intends to reserve to himself the entire liberty of performing or not performing his promise.²

¹ Taylor v. Brewer, 1 M. & S. 290; Roberts v. Smith, 4 H. & N. 315. So a promise to forbear bringing a suit as long as I choose is no consideration for a counter promise. Strong v. Sheffield, 144 N. Y. 392. See also, Blaine v. Knapp, 140 Mo. 241. In Dig. 45, 1, 108. Javolenus says: *Nulla promissio protest consistere, quae ex voluntate promittentis statum capit.* In Dig. 44, 7, 8, Pomponius says: *Sub hac conditione, 'si volam,' nulla fit obligatio.*

² Nelson v. Van Bonhorst, 29 Pa. St. 352; Barnard v. Cushing, 4 Met. 230; Roberts v. Smith, 4 H. & N. 315. To the contrary is Smithers v. Junker, 41 Fed. 101; 7 L. R. A. 264. Most of the civil law jurists consider that in this condition the mere will of the

In a bilateral contract, a purely potestative condition which prevents the creation of an obligation binding upon one party, also prevents the creation of an obligation on the other party, since there is no consideration for the promise of the latter. Plaintiff's agreement to sell from four to six hundred tons of fertilizer at designated prices contained this clause: "We reserve the right to cancel this contract at any time we may deem proper. Defendants agreed to take whatever fertilizer "we may require for the spring season of 1902, not less than" a stated number of tons. It was held that since the plaintiff was not bound to sell, there was no consideration for defendant's promise to buy.³

(b) *When able, when convenient.* When impersonal expressions are used to designate the condition, such as *if it be convenient*, or *reasonable*, or *if it be approved*, or expressions relating to something outside of the mere will of the promisor, such as *when I shall be able*, the contract is valid.⁴ In these cases, there is something objective, a reference to external facts, and the obligation is not committed to the personal and arbitrary opinion of the promisor. An agreement to pay a sum of money when the promisor is able, or feels able, may be enforced upon allegation and proof that he was able before the suit was brought.⁵

promisor is the exclusive element and that consequently the agreement is unenforceable. Georgi, *Teoria delle Obbligazioni*, iv, n. 298; Demolombe (op. cit.) ii, n. 316; Duranton, *Cours de Droit*, x, n. 22; Larombière sur l' art. 1174, n. 3. But Pothier (oblig. n. 48) regarded the condition as valid, "for it is not left to my choice to give you or not to give you the object, since I have contracted to do so, if it be reasonable." Demolombe says (loc. cit.) that Pothier was led to this conclusion by an erroneous interpretation of a fragment of Ulpian on which he relied. Dig. 32, 11, 7.

³ Am. Agricultural Co. v. Kennedy, 103 Va. 171.

⁴ Boone v. A'Hern, 98 Ill. App. 610; Cocks v. Weeks, 7 Hill, 45; Edmunds v. Downes, 2 Chompton & M. 459; Works v. Hershey, 35 Iowa, 340; Newson v. Finch, 25 Bart. 175. In an action on such a promise the plaintiff must prove that the defendant is able to pay. Re Cornwall, 9 Blatchford, 114. The statute of limitations begins to run from the time the promisor becomes able. Hammond v. Smith, 33 Beaven, 452.

⁵ Pistel v. Imperial Ins. Co., 88 Md. 552. See also, Tell. Co. v. Nees, 63 Ind. 245.

When convenient, means when able.⁶

(c) *Choice of time*. When the condition merely reserves to the promisor the choice of the time when he will perform the contract, it is not left to his arbitrary discretion and the agreement is valid. A promise to pay a sum as soon as the crop is sold or the money raised from any other source is not conditioned either upon the sale of the crop or upon getting the money, but is a promise to pay within a reasonable time.⁷

A promise to pay *when I choose*, or *when I see fit*, is not a purely potestative condition. The existence of the obligation is not left to the arbitrary will of the promisor, but only the time of performance.⁸

(d) *Doing of an act*. If the contract is made to depend upon the promisor's doing or not doing something within his power, the condition is valid, but the obligation is not enforceable until the thing is done or abstained from. A promise to lease your house if I sell mine, or to sell you a lot of ground if I buy it, is valid.

§ 144. **Condition of Satisfaction.** When a contract provides that the person for whom work is to be done or articles furnished shall not be bound to pay for or accept the same unless he is satisfied with the work or thing, some cases hold the condition to be wholly dependent upon the will of the promisor, and that if he honestly says he is not satisfied, the Court will not say that he ought to be satisfied and make

⁶ *Lewis v. Tipton*, 10 Ohio St. 88. *Si ita promissum est, 'cum commodum erit,' hoc est, 'cum sine incommodo meo potero.'* Dig. 50 16, 125.

⁷ *Nunez v. Dantell*, 19 Wallace, 560. So a promise to pay a sum "as soon as my accounts at P. are settled" is not conditional upon the collections being made. *Ubsdell v. Cunningham*, 22 Mo. 124. A promissory note expressed to be "payable when payor and payee mutually agree" is enforceable after the lapse of a reasonable time. *Page v. Cook*, 164 Mass. 116; 28 L. R. A. 759. See *Ramot v. Scholenfels*, 15 Iowa, 58, to same effect. So a promise to pay eventually means within a reasonable time. *Braunman v. Henderson*, 12 B. Mon. 61.

⁸ See *ante*, note 2; *Pandectes francaises*, vol. 42, sec. 1085; *Demolombe* (op. cit.) ii. n. 319, 320; Dig. 45, 1, 46, 2.

him liable on the ground that under the circumstances a reasonable man would be satisfied.¹

But according to the better view, a distinction is made between contracts for work or objects which are properly within the domain of one's personal taste and liking, and contracts where this element is not predominant. In the former class of contracts, the promisor is not bound unless he is satisfied, and he may arbitrarily declare his dissatisfaction, provided it be real. In the latter class of contracts, the condition is construed to mean to the satisfaction of a reasonable man. Thus a contract to make a bust of the promisor's deceased husband to her satisfaction,² or a suit of clothes which will be satisfactory to the customer,³ or to paint a portrait which will satisfy,⁴ are cases in which the promisor is the sole judge whether he is satisfied or not.

When the work for which a man was employed was that of mixing colors for wall paper, and, therefore, to some extent, a matter of taste, and the contract required it to be done to the satisfaction of the employer, the latter may discharge the workman before the end of the term of employment if he is not satisfied.⁵ So a contract to render satisfactory services to a theatrical manager makes him the sole and arbitrary judge of the services.⁶ And generally a contract for satisfactory personal services leaves the matter to the uncontrolled will of the employer.⁷

The consideration which supports the promise to do the work in these cases is the implied promise of the other party

¹ *Singerly v. Thayer*, 108 Pa. 291; *Williams Mfg. Co. v. Standard Brewing Co.* 173 Mass. 356; *Wood Machine Co. v. Smith*, 50 Mich. 565; *McCormick Co. v. Okerstrom*, 114 Iowa, 261.

² *Zaleski v. Clark*, 44 Conn. 218.

³ *Brown v. Foster*, 113 Mass. 136.

⁴ *Gibson v. Cranage*, 39 Mich. 49.

⁵ *Gwynn v. Hitchner*, 67 N. J. L. 658. It was held in this case that the employee might show that he was discharged for some other reason than because the defendant was not satisfied.

⁶ *Kendall v. West*, 196 Ill. 221.

⁷ *Crawford v. Mail & Express Pub. Co.*, 163 N. Y. 404; *Sax v. Detroit Ry Co.*, 125 Mich. 252; *Frary v. Am. Rubber Co.*, 52 Minn. 264; 18 L. R. A. 644.

to exercise an honest judgment, and that his dissatisfaction shall be genuine and not feigned. It is in this respect unlike a promise to pay for work if one chooses to do so, in which case there is no consideration.

When, however, the character of the work is such that it is not properly to be decided as a matter of individual taste whether it is well or ill done, the condition of satisfaction is construed by some authorities to mean that if the work is done to the satisfaction of a reasonable man, the condition is fulfilled, and the promisor cannot be allowed to act capriciously.⁸ Where the contract was to pay for making certain changes in boilers as soon as the promisor "is satisfied that the boilers as changed are a success," it was held that the duty to make payment did not depend upon the arbitrary determination of the promisor.⁹ A contract to furnish pumps to work in a satisfactory manner, means that the pumps shall work in a manner satisfactory to a reasonable person, and does not imply that they shall be satisfactory to the engineer appointed to inspect them.¹⁰

When the stipulation is that the work or thing shall be satisfactory without stating to whom, it means satisfactory to the other party to the contract.¹¹

§ 145. **Condition of Trial and Approval.** When an article is delivered to a person upon the condition that if he approves of it after trial, he shall buy it, or with an option to buy within a certain time if he finds it satisfactory, and in case he does not approve it, then the article shall be returned, the agreement constitutes a valid potestative condition precedent

⁸ *Union League Club v. Blymer Co.*, 204 Ill. 117; *Clark v. Wood*, 9 Q. B. D. 276; *Dallam v. King*, 4 Bing. N. C. 105; *Hawkins v. Graham*, 149 Mass. 284. Such contracts to satisfaction are like the *emptio ad gustum* of Roman law. If wine, for instance, was sold upon condition of being satisfactory to the purchaser, he could only reject it when it was such as would be condemned by wine merchants generally. Dig. 18, 6, 15.

⁹ *Duplex Safety Co. v. Garden*, 101 N. Y. 387.

¹⁰ *Lockwood Mfg. Co. v. Mason Reg. Co.*, 183 Mass. 25.

¹¹ *McCormick Co. v. Chesrown*, 33 Minn. 32; *Campbell Co. v. Thorp*, 1 L. R. A. 645.

on the part of the buyer. It is implied that his approval shall be exercised in a reasonable and not in a capricious manner, merely to defeat the contract.¹ The consideration for the promise of the seller to deliver is the promise of the buyer to take and pay for the article if he approves, and to exercise an honest judgment.

When the agreement provides that the buyer shall have a certain time in which to try and approve the article, then if he retains it and fails to give the seller notice of his disapproval within a reasonable time after the expiration of the period limited, an approval and acceptance will be implied. What is a reasonable time is a question of fact.²

If no time is fixed, the buyer has a reasonable time in which to make trial and express his determination, and if he retains the article longer, he is presumed to have accepted and the sale is absolute.³ If after once declaring his non-approval he continues to use the article, that is not a use for trial and amounts to an election to make the purchase.⁴ Since there is no sale and the property does not pass until approval express or implied is made, a loss *pendente conditione* falls on the seller.⁵

This contract of sale on trial and approval is often called a "sale or return," but it differs from an alternative contract under which the person to whom an article is delivered agrees either to pay the purchase price at a certain time or to return it.⁶ In this case, the contract is not conditional and the loss is on the party in possession.

The contract of sale on trial and approval is also to be distinguished from an agreement under which the purchaser has

¹ Pennell v. McAfferty, 84 Ill. 364; Dallam v. King, 4 Bing. N. C. 105; Stodhard v. Lee, 3 B. & S. 364.

² Bostain v. De Laval Separator Co., 92 Md. 483; Springfield Engine Co. v. Sharp, 184 Mass. 268; Elphick v. Barnes, 5 C. P. D. 321. Sale of Goods Act, art. 18.

³ Delumater v. Chappell, 48 Md. 253; Spickler v. Marsh, 36 Md. 222; Kahn v. Klabunde, 50 Wis. 235.

⁴ Fox v. Wilkinson, 133 Wis. 337; 14 L. R. A. (N. S.) 1107.

⁵ See *post*, § 148, as to risk of loss.

⁶ See the next chapter dealing with alternative contracts.

the right to rescind the sale, and return the article which constitutes a potestative condition subsequent.⁷ In this case, too, the risk of loss is on the buyer since the property in the goods has passed.

A *Bailment with option to buy* is also to be distinguished from a sale on approval and from a sale with option to return. When one hires a chattel under a contract by which he has the right to purchase it at a certain price, but he is under no obligation to make the purchase and may return it if he chooses, the transaction is a bailment, and the general property remains in the bailor.⁸ When the agreement is to rent an article for a certain sum per month with the right on the part of the hirer to buy it for a designated price and in case that right is exercised, the instalments of rent paid are to be applied on the purchase price, the transaction is a bailment and not a sale.⁹ But if the contract be to hire an article and to pay certain instalments monthly or otherwise, and when a fixed amount has been thus paid, the article is to become the property of the hirer, the transaction is not a bailment but a sale, since the so-called hirer has not the option of returning the article and avoiding future payments.¹⁰

§ 146. **Conditions Potestative on the Part of the Promisee.**
Options to Buy. When the owner of land or of a chattel agrees for a consideration that the other party to the contract shall have the right to purchase the property within a certain time if the latter chooses to do so, the agreement constitutes a valid contract binding on the promisor and enforceable at the will of the promisee. It is a pure unilateral contract until the person to whom the option is given signifies his intention to exercise it, when that unilateral contract becomes,

⁷ See §§ 147, 148.

⁸ *Brannard Brew. Co. v. Billington*, 163 Pa. 76; *Mass v. Pepper* [1905] App. Cas. 102; *Helby v. Matthews* [1895] App. Cas. 471.

⁹ *Lambert, etc., Co. v. Carmody*, 79 Conn. 419; *Lippincott v. Scott*, 198 Pa. 283.

¹⁰ *Lucas v. Campbell*, 88 Ill. 447; *Lee v. Butler* [1893] 2 Q. B. 318.

by virtue of its terms, a bilateral contract obligatory on both parties.

Such an agreement is very generally spoken of as a non-revocable offer to sell. But that expression involves a contradiction in terms. There cannot be an irrevocable offer, because an offer is in essence the declaration of his will by one party alone, and it is wholly within his control until converted into a contract by an acceptance. If an offer cannot be revoked, that means that it is no longer an offer but has become one of the constituents of a contract. When my offer to sell upon certain terms at a future time, if you should choose to buy, has been accepted merely by your promise to buy then if you should choose to do so, that is not a contract, because the condition being purely potestative on your part is not a consideration for my promise. But when my offer is that if you will pay me a certain sum; or furnish some other consideration, then you shall have the right to purchase the property in the future if you choose, and you accept this offer by paying the sum, a unilateral contract is formed upon an executed consideration, and my promise does not rest upon your merely potestative promise.

The rule that a purely potestative condition on the part of the promisor renders the agreement void does not apply to such a condition on the part of the promisee. A condition of that kind on his part is valid, provided the promise on the other side is supported by an independent consideration. When a consideration supports a unilateral contract binding only one of the parties, it is no objection to it that the other party is not bound. Reciprocity of engagement or mutuality of obligation is not of the essence of contracts. One party may be bound and the other free.

It is generally held that when for a consideration, a right is given to purchase property within a certain time if the promisee chooses, and the person holding the option exercises it within the time and in the manner specified, a valid contract is made although the person giving the option may have

attempted to revoke it before the acceptance.¹ These cases speak of the transaction as being a promise to keep the offer open, or as an agreement not to revoke it, or as being in the nature of a continuing offer, but in its legal effect, the option is not an offer but a unilateral contract as above explained.

When the option is given for the purchase of land, if the holder of it duly signifies his purpose to buy, or tenders the price, if that be required, he is entitled to specific performance of the contract, and it is no objection that the original agreement was lacking in mutuality or was not signed by the promisee. When he exercises the option, the agreement becomes binding upon both parties, and either may demand specific performance or sue for damages for a breach of the contract.²

¹ *Stitt v. Huidekopers*, 17 Wallace, 384; *Grabenhorst v. Nicodemus*, 42 Md. 236; *Yerkes v. Richards*, 153 Pa. 646; *Cummins v. Beavers*, 103 Va. 230; *Ross v. Parks*, 93 Ala. 153; 11 L. R. A. 148; *Mier v. Haddon*, 148 Mich. 586. Signing by the offeree is not necessary. *Estes v. Furlong*, 59 Ill. 298. See note to *Pollock v. Brookover*, 6 L. R. A. (N. S.) 403, concerning the right to specific performance of option to purchase as affected by lack of mutuality of obligation.

An agreement for the sale of shares of stock if the purchaser's examination shall show that the earnings of the company have been as represented is not void for want of mutuality. *N. C. Ry. Co. v. Walworth*, 193 Pa. 207. A contract giving to a company for a consideration, the right to enter on certain land and bore for oil or gas, and providing that a certain royalty shall be paid if wells are operated, but reserving to it the right to terminate the contract at any time, creates a valid option. *Pittsburg, etc., Co. v. Bailey*, 76 Kan. 42; 12 L. R. A. (N. S.) 745. "When a consideration is paid for an option to buy land within a certain time and is extended without consideration for a longer period, during the latter period, it is a mere offer which may be revoked, but if accepted by tender, etc., within that period and before revocation, a valid contract is made. *Ide v. Lewis*, 10 Mont. 5. See *Coleman v. Applegarth*, 68 Md., to same effect.

Time is of the essence in an optional contract, and it must be accepted and the money paid as prescribed. *Neill v. Hitchman*, 201 Pa. 207; *Harding v. Gibbs*, 125 Ill. 85.

² *Brown v. Slee*, 103 U. S. 828; *Guyer v. Warren*, 175 Ill. 335; *Thomas v. G. B. S. Brewing Co.*, 102 Md. 418; *McCormick v. Stephany*, 57 N. J. Eq. 257. But in *Murphy v. Reid*, 125 Ky. 585; 10 L. R. A. (N. S.) 195, it was held that the option to be binding must be "upon a valuable and sufficient consideration," and that a

When the agreement giving the option is under seal no other consideration is necessary. It cannot be revoked and if exercised will be specifically enforced.³

If the option to purchase is contained in a lease the covenants of the lessee to pay the rent, etc., support the promise of the lessor to sell, if the lessee chooses to buy.⁴ But where a lease provided: "If the premises are for sale at any time, the lessee shall have the refusal of them," the Court said: "This is simply an agreement to give the lessee the first chance to make a contract, an agreement to sell if the parties can agree and not otherwise. It neither fixes the price nor provides a way in which it can be fixed."⁵

Assignment. The right of the promisee to exercise the option and buy on the terms specified may be assigned to third parties.⁶

consideration of one dollar was not sufficient. See also, *Rude v. Levy*, 43 Col. 482; 24 L. R. A. (N. S.) 91. This is a conflict with the principle that the Court will not measure the adequacy of the consideration for a contract. In *Guyer v. Warren*, *supra*, and *Cummins v. Beavers*, 103 Va. 230, the consideration was one dollar.

³ *O'Brien v. Boland*, 166 Mass. 483; *Watkins v. Robertson*, 105 Va. 269. To the contrary is *Davis v. Petty*, 147 Mo. 383, and in *Corbett v. Cronkhite*, 239 Ill. 9, it was held (three judges dissenting) that in equity the real consideration could be inquired into, and that an option given under seal for the purchase of land could be revoked, and that on account of the lack of consideration, a bill for specific performance could not be maintained.

⁴ *Willard v. Tayloe*, 8 Wallace, 557; *Hayes v. O'Brien*, 149 Ill. 403.

⁵ *Fogg v. Price*, 145 Mass. 53. In *Gelston v. Sigmund*, 27 Md. 341, a promise to renew a lease for as much rent as the lessor might be able to obtain from other parties, was held to be too indefinite to create a contract.

⁶ *Maughlin v. Perry*, 35 Md. 352; *Peoples' Street Ry Co. v. Spencer*, 156 Pa. 85; *Perkins v. Hadsall*, 50 Ill. 216; *Reed v. Crane*, 89 Mo. App. 670; *Blakeman v. Miller*, 136 Cal. 138; *Kreutzer v. Lynch*, 122 Wis. 474; *Friary, etc., Breweries v. Singleton* [1899] 2 Ch. 261. "The owner of a long term in land agreed to let it for three years, and also, when called upon by a tenant, to grant him a lease for three years, seven years or the whole term. The tenant continued in the occupation beyond the three years and became bankrupt. The assignee sold the bankrupt's estate and interest in the leasehold to a purchaser. Held, first, that the option of the tenant to take a lease

Death of the Promisor or Promisee. Since the promisor gave his consent that a sale should be made at the will of the promisee when the option contract was made, it is not necessary that he should again consent, and if the option is exercised after his death the contract is enforceable against his heirs or personal representatives.⁷

It would seem to follow from the cases previously cited holding the option to be assignable, that upon the death of the promisee, the person holding the option, the right to exercise it passes to his personal representatives. The contract should be regarded as being made with them as well as himself, just as a contract to buy upon the happening of any other contingency would be.⁸

was not gone at the end of the three years; second, that it passed to the assignee in bankruptcy; third, that the option had passed to the purchaser." *Buckland v. Papillon*, L. R. 2 Ch. App. 67.

⁷ *Maughlin v. Perry*, 35 Md. 352; *Mueller v. Nortman*, 116 Wis. 468. In *Lawes v. Bennett*, 1 Cox. 167, it was held that when the option to purchase real estate is not exercised until after the death of the person who created the option, the proceeds of sale go as part of his personal estate. The right given by a will to a designated person to buy property at a certain price is personal to him, and cannot be exercised by his executors. *Re Cousins*, 30 Ch. D. 203.

⁸ An option to purchase contained in a lease goes to the administrator of the lessee. In *Re Adams & Kensington Vestry*, L. R. 27 Ch. D. 394.

But in *Newton v. Newton*, 11 R. I. 392, it was held that the option lapses on the death of the person holding it. The Court said that the privilege given to the promisee may have been very valuable, "but it does not appear that he ever made up his mind to accept the proffered terms of sale, and in as much as neither his personal representatives nor his heirs at law could make up his mind for him, after his death we do not see how they could either succeed to or inherit the option secured to him, any more than he could succeed to or inherit his mind itself." This statement seems to be based on the erroneous notion that an option is an offer and not a contract as it really is.

In *Gustin v. Union School District*, 94 Mich. 502, where a lease gave the lessee and his assigns a right to purchase at the expiration of the term, it was held that this right passed to the administrator of the lessee and could be assigned by him. The Court said: "The deceased had merely a right to acquire an interest and at his death nothing descended to his heirs. The lease, however, with the accompanying right to purchase did pass to his representatives."

Against third parties who purchase the property with notice or knowledge of the existence of an option affecting it, the contract created by the exercise of the option is enforceable.⁹

§ 147. **Potestative Conditions Subsequent.** The rescission or termination of a contract may validly be committed to the arbitrary choice of either party. It may seem singular that if one says, "I will buy if I choose," no obligation is created, but there is one if he says, "I buy, but reserve the right to return the article and get back the price, if I choose." This distinction has been universally recognized.¹

The rescission of a sale may depend upon the choice of the seller, as when it is stipulated that he shall have the

Upon the death of a person holding an option to purchase land, there may well be questions under his will as to the power of the executor to expend the funds of the estate in taking up the option, or, if such holder of an option die intestate, there may be question as to the power of the Probate Court to authorize such an expenditure. But at all events, it would seem that such an option is an asset of the estate which may be sold and transferred to a purchaser. In *Fry on Specific Performance*, Sec. 218, it is said: "The heir or devisee of the purchaser has no right to insist on the completion of a purchase except when the contract is such as might have been enforced against his ancestor or testator, for otherwise he might be able to take the purchase money from the personal estate in order to purchase for himself that which his ancestor or testator was not bound to purchase and perhaps never would have purchased."

⁹ *Thomas v. G. B. S. Brewing Co.*, 102 Md. 418; *Cummins v. Beavers*, 103 Va. 230; *Houghwout v. Murphy*, 23 N. J. Eq. 531; *Livingstone v. Groat*, 7 Cowen, 285; *Sizer v. Clark*, 116 Wis. 534. The person who exercises his option to buy is entitled to specific performance against one who had contracted to buy the property after the option was given and before it was exercised. *Smith v. Baugham*, 156 Cal. 359; 28 L. R. A. (N. S.) 523, and note. See also, *Thistle Mills v. Bone*, 92 Md. 47.

As to the effect of an execution or attachment in the land before the exercise of the option, see *Sheeby v. Scott*, 128 Iowa, 551; 4 L. R. A. (N. S.) 368; *Ex Parte Hardy*, 30 Beav. 206.

An option must not create a perpetuity by giving an indefinite right of renewal. *Starcher v. Duty*, 61 W. Va. 373; 9 L. R. A. (N. S.) 913; *Muller v. Trafford* [1901] 1 Ch. 54.

¹ *Demolombe* (op. cit.) ii. n. 328, *et seq*; Dig. 18, 1, 3.

right to repurchase, or upon the choice of the buyer, when he reserves the right to return the article.²

A vendor may make a conveyance subject to an agreement that he shall be entitled to a reconveyance upon repayment of the purchase money, or any other sum, on or before a fixed day, or make any other stipulation by which the conveyance shall become void.³ If a contract for services for one year provides that the defendant may dismiss the plaintiff at any time during the year upon giving one month's notice, and the latter is so dismissed, the contract is not broken, but discharged.⁴ When the contract for work on a railroad provided that it should be done under the direction of the engineer of the company, who, in case the work was not done in the manner specified, or if he thought it did not progress with sufficient speed, might annul the contract by notice to the contractor, he has the absolute right so to do.⁵

² *Morgan v. Struthers*, 131 U. S. 246; *Meyer v. Blair*, 109 N. Y. 600; *Miller v. Grove*, 18 Md. 242; *La Dow v. Bement*, 119 Mich. 685; 45 L. R. A. 479. But an agreement to sell property at a low price with the privilege of buying it back at a higher price, may be designed to conceal an usurious transaction, and if so, will be treated as a loan. *Starkweather v. Prince*, 1. McArthur, 144, and other cases cited in note to *Rogers v. Blouenstein*, 3 L. R. A. (N. S.) 213.

When the seller of goods orally agrees to buy them back on demand, the contract is not for the sale of goods within the Statute of Frauds, but is a promise to rescind the contract of sale and is valid. *Johnston v. Trask*, 116 N. Y. 141; 5 L. R. A. 630.

In *Thornton v. Wynn*, 12 Wheaton, 192, Washington J. says: "If by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return is equivalent to an offer accepted by the vendor, and in that case the contract is rescinded and at an end, which is a sufficient defence to an action brought by the vendor for the purchase money, or to enable the vendee to maintain an action for money had and received in case the purchase money has been paid."

³ *Hinkley v. Wheelwright*, 29 Md. 348. The agreement to resell need not be recorded. *Waters' Lessee v. Rigglin*, 19 Md. 553. If the right to repurchase is not exercised within the time limited, the condition becomes void. *Ibid*

⁴ *Jenkins v. Long*, 8 Md. 132.

⁵ *Geiger v. Western Md. R. Co.*, 41 Md. 4. See also, *Johnson v. Howard*, 33 Wis. 331; *Williams v. R. R. Co.* 112 Mo. 463; *Railroad Co. v. Price*, 138 U. S. 185; *Grafton v. Eastern Counties Ry. Co.*, 8 Exch. 698.

If the contract by which A. agrees to do a thing by a certain time, provides that if it be not done, the contract shall be void, that stipulation does not enure to the benefit of A., so that by failing to do the thing, his liability is at an end, but on A.'s default, the other party has the option either to treat the contract as void or to affirm it and sue for damages for breach of a promise to perform.⁶ So in a lease a provision that it shall become void upon failure to pay or not or perform other covenants gives the option to the lessor to declare a forfeiture.

A potestative condition subsequent by which one party has the right thus to rescind the contract is to be distinguished from a term in the agreement by which it is to come to an end upon the occurrence of a future event. That event when it happens *ipso facto* puts an end to the contract. My agreement to rent a house to you as long as you are in my service, is no longer binding when your employment ceases.⁷

§ 148. Risk of Loss or Deterioration Pending the Condition.

When the agreement to sell a chattel is made upon a condition precedent, either casual or potestative, the contract is not fully perfected and enforceable until the occurrence of the event placed as the condition, and consequently the risk of the loss of the subject-matter is upon the seller or promisor. The question of risk in such case presupposes a bilateral contract, a promise on the one hand to deliver, and on the other to pay. If when the condition is fulfilled, the thing which is the subject-matter of the contract has ceased to exist, the impossibility of making delivery relieves the seller from all liability, and hence the correlative obligation of the buyer is also extinguished.¹ So where goods are sold

⁶ *Campbell v. Westcott*, 5 Cowen, 270. See also, *Vickers v. Electroyom Co.*, 67 N. J. L. 665; cited *ante*, § 128, note 16.

⁷ A promise to pay a certain sum annually until the promisee obtains suitable employment, should be interpreted to mean until he has a reasonable time in which to obtain employment. *Pandectes Francaises*, vol. 42, § 1173.

¹ See *post*, part vi, art. Impossibility of Performance.

on trial and approval, a loss or damage before approval falls on the seller, unless it was caused by the negligence of the buyer.² This contract is to be distinguished from a strictly alternative agreement by which a party promises, either to return the article or to pay for it.³

If pending the performance of a condition precedent the goods have not been wholly lost, but have perished in part or have materially deteriorated, the American Sale of Goods Act, which is in force in some of the States, gives to the buyer the option of treating the contract as avoided or of requiring the seller to deliver the part remaining or the part not deteriorated upon payment of the agreed price.⁴ In Roman Law, the contract of sale was void if more than half of the thing sold was destroyed, otherwise the buyer was entitled to a proportionate reduction.⁵ If the thing sold had merely deteriorated, the loss was on the buyer, since he would have benefited by an increase in value.⁶

² *Gottlieb v. Rinaldo*, 78 Ark. 123; 6 L. R. A. (N. S.) 273; *Sturm v. Boker*, 150 U. S. 312; *Pike Elec. Co. v. Richardson Co.*, 42 Mo. App. 272; *Kirkham v. Attenborough*, [1897] 1 Q. B. 201. In *Elphick v. Barnes*, 5 C. P. D. 321, a horse was sold on condition that the buyer should try him for eight days and then to be returned if he did not suit. The horse died on the third day and it was held that no action would lie for the price.

³ See next chapter relating to alternative contracts.

⁴ In *Eppstein v. Kuhn*, 225 Ill. 115, 10 L. R. A. (N. S.) 117, where the contract was for the sale of real estate and a deterioration in its value was caused by fire, it was held that the loss was on the vendor and that the purchaser was entitled to the property with compensation. In *Hawkes v. Kehoe*, 193 Mass. 419, 10 L. R. A. (N. S.) 125, where the contract provided that at the time of delivery, the premises were to be "in the same condition in which they now are," it was held that a destruction by fire of a building on the premises put an end to the contract. The general rule is when the contract for the sale of land is absolute and not conditional, the ownership in equity is transferred and the loss before conveyance actually made is on the purchaser. *Brewer v. Herbert*, 30 Md. 301. But see *Wells v. Calnan*, 107 Mass. 514.

⁵ Dig. 18. 1. L. LL. 57. 58.

⁶ Dig. 18. 6. S. Art. 1182, of the Code Napoleon, provides, "when the agreement was made under a suspensive condition, the thing which is its subject matter remains at the risk of the promisor who is not obliged to deliver it until the performance of the condition."

In the case of a loss or deterioration of the subject-matter occurring after performance of the contract, and before the happening of a *condition subsequent* by which it might be rescinded, the question as to which party should bear the loss is much controverted. According to one view, the loss should be borne by the seller, and he has no right to keep or demand the price, although the buyer cannot restore the thing, or cannot return it undamaged.⁷

But the better view is that the revocation of a contract of sale, in pursuance of a condition subsequent, is not a resale, but creates an obligation on the part of the one to restore the thing, and on the part of the other to return the price. If the thing has been destroyed, the duty to restore cannot arise, because of impossibility, and the correlative duty to refund has then no ground. Just as the loss of the thing would prevent the formation of a contract if the condition were precedent, so that loss prevents the creation of an obligation on either side, when the condition is subsequent. This construction is in conformity with the usual intention of the parties. When they insert in their contract a condition subsequent, what they generally mean is that the contract should be unmade, upon fulfillment of the condition, and that each party shall surrender what he may have

If the thing is wholly perished without his fault, the obligation is extinguished. If the thing has deteriorated without the fault of the promisor, the promisee has the choice either of rescinding the contract or demanding the thing in its existing condition without diminution of price. If the thing was damaged by the fault of the promisor, the promisee has the right either to rescind the contract or to demand the thing in its existing state with damages.

⁷ Duranton (*op. cit.*) xi, n. 31, who relies on the retro-activity of the condition under Code, art. 1183. Giorgi (*op. cit.*) iv, n. 385, who says that it was probably the intention of the parties that the loss should be borne by the seller upon whom it would have fallen if the contract had not been made. Since the exercise of the right to rescind is not the making of a new contract, it does not require an object any more than a consideration. In *Lyons v. Stills*, 97 Tenn. 514, it was held that the buyer of a pony, under an option to rescind the contract within six months if he became dissatisfied, is not required to return the animal when it died the night after the purchase, and that to an action on a note given for the price of the pony failure of consideration is a defense.

received. The buyer says, "You will return to me the price." Very well. But the seller at the same time says to the buyer, "You will return to me the thing sold." That implies that they can each be put back in the same situation as if the contract had not been made. Consequently, the rescission cannot take place when this reciprocal restitution has become impossible by the loss of the thing occurring pending the condition.⁸ On the other hand, if the thing has merely deteriorated, the buyer has a right to return it and demand the price. The thing exists although damaged not by the fault of the buyer.⁹ If the contract be a right to repurchase by the seller and the thing has deteriorated or perished by the fault of the buyer, the latter is liable in damages; otherwise the loss falls on him as owner.¹⁰

§ 149. **Implied Conditions.** Although the contract be absolute in its terms, the parties may have intended that the obligation to perform it should be dependent upon the happening of some future event. In such case, a condition to that effect will be implied, and the contract construed as being subject to it. The condition is extracted from an analysis of the contract and a consideration of the subject-matter and the circumstances under which it was made. Such a condition resulting from the presumed intention of the parties is implied in fact. When the condition results from the legal character of a particular transaction, it is said to be implied in law. Thus in a case of chattels, it is a condition implied in law that the seller should have title to the goods; and in the case of a bailment it is an implied condition that the bailee shall not misuse the subject of the bailment, or apply it to a different purpose.

Implication of possibility of performance. When at the time of making the contract, the thing agreed to be done could be done, it is an implied condition that performance shall continue to be possible in fact or in law at the time

⁸ Demolombe (*op. cit.*) ii, n. 461.

⁹ *Head. v. Tattersall*, L. R. 7, Ex. 7.

¹⁰ Demolombe (*op. cit.*) ii, n. 457.

when due. It is sometimes said that subsequent impossibility is no excuse for failure to perform except in a few cases. But in a subsequent chapter on impossibility of performance, I shall endeavor to show that this statement is inaccurate, and that unless the agreement can fairly be construed to imply a warranty by the promisor, that performance will be possible, an objective and physical impossibility of performance arising after the making of the contract operates to discharge it.

§.150. **Future Circumstances.** When the parties contract upon the tacit assumption that a certain event will happen, or that certain circumstances will exist at the time when performance will be due, a condition will be implied, since the agreement is founded upon that assumption. So when specific chattels are sold but the title does not then vest in the buyer, the subsequent destruction of the chattels without the fault of the seller, discharges the contract.¹ When the performance of the contract depends upon the existence of certain things at the time of execution, that existence will be implied as a condition.²

When a furnished house is rented for occupation, it is an implied condition that the house and furniture shall be in a fit state for use.³

¹ *Dexter v. Norton*, 47 N. Y. 62. "There is no hardship in placing the parties, especially the buyer, in the position they were in before the contract was made. The buyer can only lose the profits of the purchase; the seller may lose the whole contract price and the enhanced value." In *Chandler v. Webster* [1904] 1 K. B. 501, Romer, L. J., said: "When there is an agreement based on the assumption by both parties that a certain event will in the future take place, and that event is the foundation of the contract and through no fault by either party and owing to circumstances which were not in the contemplation of the parties when the agreement was made, it happens that before the time fixed for that event, it is ascertained that it cannot take place, the parties thenceforth are both free from any subsequent obligation cast upon them by the agreement. But except in cases where the contract can be treated as rescinded, *ab initio*, any payment previously made and any legal right previously accrued, according to the terms of the agreement, will not be disturbed."

² *Stewart v. Strue*, 127 N. Y. 507.

³ *Willson v. Finch-Hatton*, 2 Ex. D. 336.

Henry agreed to pay Krell £75 for the privilege of using the latter's apartment in Pall Mall, London, on the days of June 26th and 27th, 1902. It had been proclaimed that processions to celebrate the coronation of King Edward VII. would pass along Pall Mall on those days, and both parties understood that the flat was rented for the purpose of viewing the procession, but the written contract contained no reference to the purpose of the renting. Owing to the sudden illness of the King, the coronation and the processions did not take place. In an action by Krell to recover the sum Henry had agreed to pay for the use of the flat, it was held that the passing of the procession was an implied condition and that parol evidence was admissible to show that fact.⁴

But in another of these coronation cases, it was held, notwithstanding the implied condition, that if money has been paid before it was ascertained that the future event contemplated by the contract would not occur, it could not be recovered back.⁵ In that case, A. agreed to pay B. £141 15s. for the use of a room for the purpose of viewing the coronation procession, the payment to be made before the date fixed. He paid £100 on account, and when the procession was abandoned, sued to recover that sum as for a total failure of consideration, while B. counter-claimed for the remaining £41 15s. of the rental. It was held that B. was entitled not only to keep the £100, but also to recover the additional £41 15s. The Master of the Rolls said: "The fulfilment of the contract having become impossible through no fault of either party, the law leaves the parties where they were, and relieves them both from further performance of the contract. Therefore, if by the contract the obligation to pay for the room did not arise until after the procession had taken place, then the obligation, being based on the happening of the procession which has become impossible, the hirer is relieved from that obligation; but if from the contract, the obligation to pay for the room had accrued before the procession came impossible, the hirer, if he has

⁴ *Krell v. Henry*, [1903] 2 K. B. 740.

⁵ *Chandler v. Webster*, [1904] 1 K. B. 497.

paid, cannot get his money back, and if he has not paid, is still liable to pay." This seems to be unreasonable and arbitrary, for if the condition is to be implied at all as the substantial foundation of the agreement of the parties, it would follow that when the condition fails, the contract is discharged, and money paid upon it, should be repaid. It is not a case of impossibility of performance by either one of the parties, and, therefore, the rule that they will be left where the impossibility placed them, is not applicable.

Defendant sold to plaintiff a cargo of cotton seed, to be shipped at certain Egyptian ports, during the month of January, 1900, per Steamship Orlando. After the making of the contract, the vessel named was stranded so that it was impossible for her to arrive at the ports of loading during January, and notice of that fact was given to the plaintiff. He did not secure another vessel or buy another cargo, but sued for breach of the contract. It was held that a condition would be implied to the effect that the contract would be discharged in the event of the ship not arriving at the ports or loading within the stipulated time without any fault on the part of the defendant, and that the implication of that condition was not excluded by a clause in the contract providing for its cancellation in case of prohibition of export or hostilities preventing shipment.⁶

§ 151. **Sale of Future Things.** When the subject-matter of a contract is a thing which does not yet exist, but may or may not come into being, the general rule is that a condition will be implied on account of the futurity and uncertainty. So when the sale is of a future product of an orchard or farm, if it is destroyed by hail or blight, the contract is discharged.¹ In these cases, the contract is for a thing expected, *pactum de re sperata*, and the parties intend that the completion of the contract should be conditioned upon its future existence.

⁶ Nickoll v. Ashton, [1900] 2 Q. B. 298.

¹ Anderson v. May, 50 Minn. 280; 17 L. R. A. 558, Howell v. Coupland, L. R. 9, Q. B. 462.

But a condition is not always implied merely because the contract relates to a future thing of uncertain existence. The object of the contract may be not the thing itself, but the hope, expectation or chance of getting it. That is then the sale of an expectation, *emptio spei*, and the buyer assumes the risk of the possible non-existence of the thing. The purchase of the fish that may be caught at a certain time, is a contract for a thing expected, and is conditional, while the purchase of the next cast of a fisherman's net is a contract for an expectancy and is absolute. In the first case, if nothing be caught, the buyer owes nothing, but in the latter, the buyer is liable for the sum agreed on although nothing be caught. Whether the contract is for a future thing when it comes into existence or for the chance of it, is a question of construction.

In *Losecco vs. Gregory*,² the defendant owned an orange grove south of New Orleans. The plaintiff, Losecco, was a buyer of orange crops and frequently bought them in advance. They made this contract: "I have this day sold to V. Losecco two crops of oranges on my place as follows: *i. e.*, 1. All oranges that my trees may produce in the year 1899. 2. All oranges that my trees may produce in the year 1900. For the sum of \$8,000—\$4,000 paid cash down, and the balance, \$4,000, to be paid on December 1, 1900. Purchaser assumes all risks. Vendor to provide teams and carts and drivers to move the crops."

About three months later, and before the trees had even put out blossoms for the crop of 1899, a freeze occurred which killed defendant's trees, root and branch, the thermometer being 8° above zero. "Cold weather had been known to destroy crops of the year and even killed the trees half way down, but never within the memory of the oldest inhabitants have the trees been killed entirely or even so injured as not to produce a crop the following year." The plaintiff sued to recover the \$4,000 paid under the contract and the defendant demanded in reconvention the \$4,000 payable December 1. The plaintiff alleged that the sale was

² 108 La. 648.

of future crops and the contract conditional upon the crops coming into existence. The defendant alleged that the contract was for the sale, not of the crops, but of the hope or expectations thereof.

The Court said: "If the sale was of the hope merely, then the plaintiff got what he bargained for, and there is an end of the matter. If, on the other hand, the sale was of the crops themselves, then the loss must fall upon one or other of the parties according to the interpretation placed upon the risk clause. * * * At the time this contract was entered into the defendant had the hope or chance that his orchards would produce crops of oranges in 1899 and 1900. His chance in that regard he conveyed to the purchaser. In consideration of the price paid and to be paid, the purchaser stepped into his shoes. From that moment, he had no further chance in connection with the crop and no further risk, and from the same moment, the purchaser had all the chance and all the risk."³

§ 152. **Implied Conditions Subsequent.** In only a few instances is the condition *implied* by which a completed contract may be rescinded. Generally, the only remedy of one who has fulfilled the contract on his side against the other who fails to perform, is an action at law for damages, although this is often an insufficient or illusory remedy. If the buyer of goods fails to pay for them after delivery, the seller is not entitled to rescind the contract and retake the goods in the absence of fraud, mistake, etc., unless by virtue of a special stipulation to that effect.¹

But if the buyer becomes insolvent before delivery, there is an implied condition, that the seller may stop the goods

³ The first judgment in this case held that the contract contemplated the continued existence of the trees; that there had been a failure of consideration and that the defendant must return the \$4,000, affirming the trial court. The second judgment held that the defendant was entitled to keep the \$4,000, but not entitled to recover the final payment. The final judgment held that the defendant was entitled to the whole \$8,000.

¹ *McElroy v. Seery*, 61 Md. 389.

in transitu, or may refuse to deliver or to allow the credit agreed upon.² When it is the seller who becomes insolvent after receiving the price of the goods, not appropriated to the contract, and before delivery, specific performance of the contract will be decreed, for otherwise the buyer loses both the goods and the price he paid, and the creditors of the seller get the buyer's money and the goods, too.³

In a loan or bailment for hire, there is an implied condition by which the bailor may rescind if the bailee misuse the thing or put it to a use not contemplated. There is an implied condition in a contract of service that the employee shall not do anything which may injure the business of his employer. If he does, the latter may rescind the contract.⁴

When the consideration upon which an absolute conveyance of land was made, was the agreement of the grantee to support the grantor during life, it is implied as a condition subsequent that if the grantee fails to do so, the conveyance may be annulled.⁵

§ 153. Implied Conditions in Bilateral Contracts—Dependent Promises. When, according to the construction of a contract containing mutual promises, it appears that the parties

² Sale of Goods Act, art. 39, *et seq.*; *Oelrich v. Ford*, 21 Md. 489. In *Ex Parte Chalmers*, 8 Ch. App. 289, Mellish, L. J., said that if the buyer becomes insolvent before performance of the contract "the seller, notwithstanding he may have agreed to allow credit for the goods, is not bound to deliver any more goods under the contract until the price of the goods not yet delivered is tendered to him; and if a debt is due to him for goods already delivered, he is entitled to refuse to deliver any more till he is paid the debt due for those already delivered as well as the price of those still to be delivered." See also, *Morgan v. Bain*, L. R. 10, C. P. 157; *Ex Parte Stephenson*, 10 Ch. D. 486.

³ *Parker v. Garrison*, 61 Ill. 250; *Clark v. Flint*, 22 Pick. 231. *Contra*, *McLaughlin v. Piatti*, 27 Cal. 451.

⁴ *Adams Express Co. v. Trego*, 35 Md. 65.

⁵ *Wanner v. Wanner*, 115 Wis. 196; *Bruer v. Bruer*, 109 Minn. 260; 28 L. R. A. (N. S.) 608. In Illinois the conveyance may be vacated for fraud if the grantee fails to perform. *Stebbins v. Petty*, 209 Ill. 291. The grantor cannot rescind if he himself prevents performance of the condition. *Williams v. Longwill*, 241 Ill. 441; 25 L. R. A. (N. S.) 932.

intended that the performance of his promise by one party should precede performance by the other party, then performance by the first party is treated as an implied condition precedent to the liability of the second party to perform. The promise of the latter is dependent, although it may be expressed in absolute terms. Thus, if A. agrees to deliver an article to B. on May 1st, and B. agrees to pay the price on May 15th, the promise of B. is dependent on the performance of his promise by A., whose promise is independent. "When mutual covenants go to the whole of the consideration on both sides, they are mutual conditions the one precedent to the other, but when the covenants go only to a part, then a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent."¹ When, by a contract, the plaintiff covenants to do certain work at a certain time, and the defendant covenants upon its completion to give his promissory notes for a specified amount, the latter covenant is dependent upon the completion of the work at the time specified, which is a condition precedent to the right to demand the notes.² Questions relating to the effect of a part performance of the first or independent promise, and as to whether a breach of that promise was of such a substantial matter as to release the other party

¹ *Ritchie v. Anderson*, 4 East, 306, citing this as being the rule laid down by Lord Mansfield in *Boone v. Eyre*, 1 H. Bl. 273, note. The whole judgment of Lord Mansfield is quoted *ante* in § 70. As to when a covenant goes to the whole of the consideration and its performance is an implied condition of the liability of the other party to perform. see Serjeant Williams' note to *Pordage v. Cole*, 1 Saunders Rep. If the promise does not go to the whole consideration, it is subsidiary. See *post*, Part vi.

² *Slater v. Emerson*, 19 Howard, 224. Cf. *B. & O. v. Resley*, 7 Md. 297. The order in which things are to be done is the main test of the existence of an absolute promise. "When it appears that one of two promises is to be performed at an earlier date than the other, the promise that is to be first performed is independent and absolute, while the one that is to be performed last is dependent, the performance of the former being a condition precedent to the performance of the latter." Langdell's Summary, § 122. See also, *McSherry v. Brooks*, 46 Md. 121; *Phillips Co. v. Seymour*, 91 U. S. 650; *Emigrant Co. v. County of Adams*, 100 U. S. 70.

from his obligation to perform or was in respect of a subsidiary promise which only entitles the other party to claim compensation in damages are discussed in the subsequent chapters relating to the time and mode of performance of contract.

In order that the promise of one party may be construed as dependent upon performance of the other party, the two obligations or promises must be connected or spring from the same contract, or, if resulting from distinct agreements, must be intended by the parties to be correlative.³ Thus if I sell you in the first place so many bushels of wheat and then you sell me so many bales of cotton, you cannot refuse delivery of the cotton merely on the ground that I have not delivered to you the wheat. But if the two agreements are so related as to constitute in effect but one, if, for instance, your agreement to sell cotton was intended by us to effect a compromise between its price and that of the wheat which I sell, or to be in the nature of an exchange of the two articles with or without something to boot, then my failure to perform my contract to deliver the wheat releases you from your obligation to deliver the cotton.⁴

§ 154. **Promissory Conditions.** When one party to a contract represents that certain things exist or that a certain event has taken place or will take place, or when he promises to do certain things, and the promise of the other party is based upon the truth of that statement, or the performance of that promise, then the liability of the latter party is said, in English and American law, to be conditional. In such case, the contract of the first party is absolute and unconditional, but the second party's promise is said to be

³ *Gas Light Co. v. Colladay*, 25 Md. 1.

⁴ *Cf. Giorgi (op. cit.)*, iv, n. 201. In an action by A. against B. for breach of his contract, he cannot set off A.'s failure to perform another distinct contract between them, because generally under our statutes a claim for unliquidated damages cannot be pleaded on a set-off. Nor is such a defense available by way of recoupment, since it does not grow out of the same transaction. It might be that equity would restrain execution by A. on his judgment until B.'s action for breach of the other contract was tried.

dependent or conditional, and he may elect, either to rescind the whole contract upon a breach or may treat it as still in force in spite of the breach. If he chooses the latter alternative, the condition sinks to a warranty for which he may only recover damages without being released from his own promise.

The statements or promises in such cases are really terms of the contract relating to the time or mode of performance. They are in effect warranties or representations, vital or essential in their character, a breach of which affords to the other party a right either to rescind the contract or to use for damages according to the general principles governing the non-performance of contracts. The circumstance that they have been called conditions has resulted in much confusion in the terminology of the subject, and has created an obstacle to a scientific classification. In the civil law such representations or promises are never treated as conditions. In regard, therefore, to these promissory conditions the two chief requisites of true conditions properly so called, are lacking, namely, the futurity and the uncertainty of the event upon which the agreement is based. In a true condition, neither party is bound or both are bound accordingly as that event happens or not. There is no promise or warranty that the event will or will not occur. In this promissory condition, one party is always bound while the other may elect to abide by the contract, or to sue for damages as in the case of any breach of contract.

Thus in *Davison v. Von Lingen*,¹ there was a statement in a charter party that the vessel "is now sailed or about to sail from Benizaf with cargo for Philadelphia." This was held to be a condition precedent and a substantive part of the contract. Since the vessel was not fully loaded at the date of the charter party and did not sail until a week afterwards, the charterer was held to be entitled to repudiate the contract, and also to recover as damages the difference

between the contract price of that vessel and the cost of another.

In *Behn v. Burness*,² a charter party stated that plaintiff's ship "is now in the port of Amsterdam"; and it was agreed that the vessel should go thence to an English port and load a cargo. The ship did not arrive at Amsterdam until some days after the date of the contract, and upon its arrival at an English port, the defendant, the charterer, refused to load. In an action by the shipowner to recover damages as for a breach of contract, it was held that the plaintiff was not entitled to recover.

This particular result was undoubtedly correct, and may be explained upon either one of two theories, both of which are tenable. If, according to the true construction of the contract, the charterer's agreement was to hire a ship which was then in the port of Amsterdam, and the shipowner undertook to warrant or promise that the ship was then in that port, upon a breach of that warranty or representation the charterer would be entitled to reject the ship when it arrived, just as he would have the right to reject merchandise tendered after the time stipulated for delivery, and the other party, the shipowner, would be liable in damages for his failure to supply that which he had undertaken to do, namely, a ship which he had represented to be, on a certain day, in the port of Amsterdam.

On the other hand, if the contract should be construed as meaning that the parties contracted upon the understanding or assumption that the ship was then in the port of Amsterdam, and that the owner did not intend to be liable if the ship had then ceased to exist or was not in that port, that assumption, while not strictly speaking a technical condition, because it did not relate to a future event, was yet in the nature of a condition, and the contract, therefore, was void because that essential fact, upon which it was based, did not exist. Consequently, neither party was bound, just as neither would be bound in the case of a contract to sell a

² 3 Best v. Smith, 751 S. C.; 32 L. J. Q. B. 204.

horse, "now on my farm at Oak Grove," if at that time the horse was dead.³

It seems to me that this is the true construction of the contract in *Behn v. Burness*, and that it was void since it was based on the assumption that a certain thing existed when in fact it did not exist, and that neither party was bound. Now, the Court, while practically deciding the case upon one of these theories, used language appropriate to the other; and, while ruling that the statement in the charter party, that the ship was then in the port of Amsterdam was a condition, yet gave to that condition or statement all the effect of an express promise or warranty, and held that the charterer had the option of either considering himself discharged, or of enforcing the charter party, thus leaving the shipowner bound as upon a promise from the time the contract was made, and the charterer free from all liability. In the course of the judgment, it was said:

"With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty—that is to say, a condition, on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz, a stipu-

³ This particular instance of a ship's being in port is mentioned in Dig. 28, 7, 10, as not creating a real conditional contract, since it relates to a present or past event. *Cum nulla sit conditio, quae in praeteritum confertur vel quae in praesens, reluti, 'si rex Parthorum vivit,' 'si navis in portu stat.'*

lation by way of agreement for the breach of which a compensation must be sought in damages.”⁴

§ 155. **Promises Treated as Conditions.** Such a promissory condition may be waived. In *Bentsen v. Taylor Sons & Co.*,¹ a charter party dated March 29th described the ship as “now sailed or about to sail from a pitch pine port to the” United Kingdom, and provided that after discharging the homeward cargo, the ship should proceed to Quebec and load a cargo for the charterers. Both parties knew at the date of the charter party that the ship was then or had been

⁴It may be that one reason why the English courts call such a representation a condition rather than a warranty is that in English law a buyer is not entitled to reject goods tendered on account of a breach of warranty, but must claim damages. But in American law he has this right. In *Davison v. Von Lingen*, 113 U. S. 49, such a representation as to the place of a ship is called a condition or warranty. Sir W. Anson (*Contracts*, 10th ed., p. 321) cites *Behn v. Burness* in support of his statement that “a condition may assume the form, either of a statement or a promise.” Again he says, p. 324: “One cause of the confusion which overhangs the use of the term warranty arises from the rule that a condition may change its character in the course of the performance of a contract; a condition the breach of which would have effected a discharge if treated so at once by the promisee ceases to be a condition if he goes on with the contract and takes a benefit under it. It is then called a warranty.” This aspect of a condition is pointed out in *Behn v. Burness*.

Again, on p. 161: “The question for the court was whether the words *now in the port of Amsterdam* amounted to a condition the breach of which entitled Burness to repudiate the contract, or whether they only gave him a right, after carrying out the contract, to sue for such damages as he had sustained.”

Now as I have endeavored to show in the text, the statement in this case should be treated exclusively either as a condition or as a warranty or promise. If a condition, then neither party was bound—the contract was void the day it was made although the parties would not be aware of that until afterwards. If a warranty or promise, then Burness could either have repudiated or accepted and sued for damages. It is confusing to call it a condition and then give to it the effect of a warranty or promise. If Behn had refused to tender the ship when he discovered that it was not in the port of Amsterdam at the date of the charter party, could Burness have maintained an action for damages for failure of the condition?

¹ [1893] 2 Q. B. 274.

at Mobile. She sailed thence on April 23rd. In June, the charterers wrote to the plaintiffs, saying, "if you send the ship to load under our charter party, we shall protest against loading, and difference of freight and insurance on goods to be shipped." In an action by the shipowner, it was held that the above-mentioned description in the charter party, "now sailed," etc., was a condition precedent and not a warranty upon whose breach the defendants would have been entitled to repudiate, but that the defendants had waived this right, and were liable for freight less such damages as they had sustained by breach of the condition. This ruling, of course, was based upon the theory that the defendants' letter to the plaintiff had induced him to believe that the charter party was still in force, and that the defendants did not intend to treat the contract as at an end. Bowen, L. J., said:

"When you have a representation made in a written document it is for the Court to decide whether it is a mere representation or whether it is what is called, I admit not very happily, a substantive part of the contract, that is, a part of the contract which involves a promise in itself." * * * And if the statement amounts to a promise, "it still remains to be decided by the Court, as a matter of construction, whether it is such a promise as amounts merely to a warranty, the breach of which would sound only in damages, or whether it is that kind of promise, the performance of which is made a condition precedent to all further demands under the contract by the person who made the promise against the other party—a promise, the failure to perform which gives to the opposite party the right to say that he will no longer be bound by the contract." The statement in the charter party "is a representation, the accuracy of which is made a condition precedent, though I do not doubt that the fulfilment of a promise may be equally made a condition precedent."

Under a contract for the sale of five hundred tons No. 1 pig iron, shipped from Glasgow to New Orleans, as soon as possible, the shipment from Glasgow is a material part of the contract, and the buyer may refuse to accept iron shipped

as soon as possible from Leith, another Scotch port, and arriving at New Orleans as soon as or earlier than it would have arrived by the first ship that could have been obtained from Glasgow.²

In a sale of goods for "prompt shipment" from a foreign port, such shipment is a condition precedent, and delay is not excused by the fact that the port selected by the vendor for shipment was blocked by ice for a month or two after the goods were put on board.³ When the contract is for the sale of goods to be shipped from a foreign port, the shipment to be made in certain months, the goods to be of a certain quality and the name of the vessel to be declared as soon as known to the seller, these are all conditions precedent to be performed by the seller before he can sue for the breach of the contract.⁴

When the subject-matter of a sale is not in existence or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, "is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."⁵

² *Filley v. Pope*, 115 U. S. 213.

³ *Tobias v. Lissburger*, 105 N. Y. 404.

⁴ *Salmon v. Boykin*, 66 Md. 541.

⁵ *Pope v. Allis*, 115 U. S. 374. See also, *Columbian Iron Works v. Douglas*, 84 Md. 44.

CHAPTER II

J

ALTERNATIVE CONTRACTS

§ 156. In General—Distinguished from Other Transactions.

An alternative contract is where a party agrees to do either one of two or more different things, and when the doing of any one of those things discharges the liability. If the contract is to pay a sum of money in case one does or fails to do a certain thing, it is a question of construction whether the contract is alternative, so as to give the party a right to perform it either by paying the money or doing the thing, or whether the act or forbearance is the principal object, and the payment of the money is stipulated by way of penalty or liquidated damages.

A covenant in a lease of a farm not to do certain things "under an increased rent" of a fixed sum, gives the tenant a right to do those things upon paying the increased rent.¹ Defendant covenanted never to practice as a physician in a certain city so long as plaintiff should be in practice there, provided, however, he should have the right to do so at any time after five years, by paying to the plaintiff \$2,000, but not otherwise. The sum named was held to be neither a penalty nor liquidated damages, but a price fixed for what the contract permitted him to do if he paid.² The Court said that the case was within the language of Lord Mansfield, in *Lowe v. Peers*,³ that if there is a covenant not to plough with a penalty in the lease, a Court of Equity will relieve against the penalty; "but if it be worded to pay £5 for every acre ploughed up, there is no alternative, no room for any relief against it, no compensation; it is the substance of the agreement."

¹ *Magrane v. Archbold*, 1 Dow. 107. See also, *Bowers v. Nixon*, 12 Q. B. 546.

² *Smith v. Bergengren*, 153 Mass. 236; 10 L. R. A. 768.

³ 4 Burrows, 2229.

When, however, the real purpose of the contract is that a certain thing shall, or shall not, be done, and a sum is to be paid for a violation of the agreement, then the contract is not in the alternative and the promisor has not the option of either paying the liquidated damages or performing the agreement. Thus, when one sells out his business and good will and agrees not to carry on a similar business within a certain locality, and it is stipulated that a fixed sum shall be paid in case he does, the contract is not alternative and its violation will be enjoined.⁴

A contract, by which the defendant agreed to sublet certain premises to the plaintiff, stipulated that if he should fail to obtain the assent of his landlord to the sublease, he should pay to the defendant £1,000 by way of liquidated damages. It was held, upon his refusal to apply to his landlord for such assent, that he was not entitled by paying the £1,000 to escape a decree for specific performance.⁵

A contract for the exchange between the parties of certain described premises, provided that each party should execute a deed by a certain time "or forfeit the sum of \$500." The Court said that it was an absolute agreement on the part of both to exchange properties, and should be construed as though it read, "we each bind ourselves to the performance of this contract in the penal sum of \$500." "It cannot

⁴ *Ropes v. Upton*, 125 Mass. 258; *Crane v. Peer*, 43 N. J. Eq. 553; *Laundry Co. v. De Bow*, 98 Me. 496. This principle was not understood in *Hahn v. Concordia Society*, 42 Md. 460. There the plaintiff contracted for the exclusive services of the defendant as an actor for a number of months, and it was provided that if the defendant should violate the contract he would pay \$200 as "a conventional fine." The plaintiff applied for an injunction to restrain the defendant from acting at another theatre. In denying this relief Miller J. said that the parties had themselves settled the question and amount of damages resulting from a breach of the contract, and since the plaintiff had fixed by his own estimate the extent of the injury he would suffer, he could only recover that stipulated sum, and was precluded from asking for other relief by way of injunction." This ruling is based on the erroneous assumption that the defendant had the right to choose between carrying out his contract and paying \$200.

⁵ *Long v. Bowring*, 33 Beav. 585.

be regarded as an agreement to do one act or in lieu thereof pay a sum of money, thus leaving it optional with the party to do either, but if optional with the defendant, his failure to perform either would give the plaintiff the option to enforce either, or maintain an action for damages.”⁶

In a case where the defendant covenanted not to burn or bate the demised premises or any part under a penalty of £10 per acre, to be recovered as the reserved yearly rent for every acre burned, an injunction was granted to prevent the burning. Lord St. Leonards said: “When a party covenants not to do a certain thing, and then proceeds to say, If I do that thing, I will pay you £10 by way of satisfaction, this agreement does not prevent the Court from saying, You shall be enjoined from doing that particular thing. The question is whether the party is restricted by covenant from doing the particular act, although if he do it, a payment is reserved, or whether, according to the true construction of the contract, its meaning is that the one party shall have the right to do the act on the payment of what is agreed upon as an equivalent.”⁷

When a mining lease provides that a certain royalty upon the ore mined shall be paid, and that if a certain number of tons are not annually mined, a given sum shall be paid as rent, the contract is in the alternative.⁸ But if the main purpose of a mining lease, or a lease of oil land, is that the work shall be diligently prosecuted and the land developed, which the lessee covenants to do, and there is a stipulation that if he fails to perform the covenant, a certain sum shall be payable as rent, such a contract is not alternative so as to give the lessee the option of either paying the sum or working the mine; and the lessor may terminate the lease under a clause in it providing for a forfeiture in case of non-compliance with its terms.⁹

⁶ *Noyes v. Phillips*, 60 N. Y. 412.

⁷ *French v. Macale*, 2 Dru. & W. 269.

⁸ *Clark v. Glasgow Ass. Co.*, 1 Macq. H. L. C. 668; *Bamford v. Lehigh Zinc Co.*, 33 Fed. Rep. 677. Cf. *Flynn v. White Breast Co.*, 72 Iowa, 738.

⁹ *Chauvenet v. Person*, 217 Pa. 464; 11 L. R. A. (N. S.) 417.

A contract by which a party, who agrees to sell a certain thing at a future time, reserves the right to be discharged from liability by paying a certain sum is not alternative so far as the promisee is concerned. The latter has the right only to demand that thing which is the principal object of the contract. If my agreement to sell you a horse at a future time provides that I shall have the right to be discharged upon paying a certain sum, the death of the horse before the time for performance arrives, extinguishes the contract. So if a sum of money is to be paid by way of liquidated damages, for failure to deliver the thing agreed to be sold, the accidental destruction of the thing relieves the seller from liability, since the sum was fixed as compensation for a breach of the contract, and there is no breach in such case. If the contract were either to deliver the horse or to pay a sum of money, then it would be alternative and the death of the horse would not relieve the seller from liability to pay the sum. Liquidated damages are only due secondarily in a case of a non-performance of the principal contract.¹⁰

§ 157. Legality and Possibility of Performance. Risk of Loss. If one of the things promised be illegal then the obligation of the party to perform the other is absolute.¹ But if the doing of the illegal thing was the principal object of the contract, which the parties disguised under the mask of an alternative agreement, so as to impose a penalty in case of non-performance, the whole contract is void.

If one of the alternatives was impossible of performance at the time the contract was made, the obligation of the promisor is concentrated upon the other, as to which it is absolute.² If both alternatives were possible when the contract was made, and one of them subsequently becomes

¹⁰ See cases cited in the next succeeding chapter.

¹ *Stevens v. Webb*, 7 Carrington & P. 60.

² *Da Costa v. Davis*, 1 B. & P. 242; *State v. Worthington*, 7 Ohio, 171, where it is said at the end of the opinion: "It would be indeed startling to the good sense of an honest man, if one, who contracted to do one of two things, need do neither if unable to do both."

impossible without the fault of the promisor, his right of election is gone and he must perform the other.³ The pledgee of a chattel agreed that upon payment of the debt, he would return the article or its equivalent in money. The thing was accidentally destroyed by fire, and it was held that the pledgee was liable as an insurer for the sum promised.⁴

If the impossibility of performing one of the alternatives was caused by the promisee, then the promisor is discharged from the obligation to performing the other.⁵ "The contract gives the party an election and creates an obligation to perform only the elected thing, but the other party has destroyed the election and so has released the performing party from his obligation to do anything."⁶

³ Penn. R. Co. v. Reichert, 58 Md. 261; Sun Printing Ass'n v. Moore, 183 U. S. 642. In the latter case the contract for the hire of a vessel provided that the hirer should keep it in repair and surrender at the expiration of the contract in as good a condition as at the start and should be responsible for all damage to hull, machinery, etc., also that "for the purpose of this charter, the value of the yacht shall be considered and taken as \$75,000." It was held that the contract imposed the duty of either returning the vessel or being responsible for its value, and that since the vessel was wrecked the hirer was liable for the stipulated sum. In Hicks v. Monarch Cycle Co., 176 N. Y. 114, it was held that if the amount agreed to be paid in the event of a failure to return an article is disproportionate to its value, it will be treated as a penalty. See cases in next chapter. In Dig. 13, 4, 2, it is said: "Where a man promises to give either Stichus or Pamphilus, he can choose what his delivery shall be of as long as both are alive, but as soon as one of the two dies, there is an end of his power of selection, or else it would be open to him to determine whether he is bound at all; assuming that he were unwilling to hand over the living slave whom alone he would be bound to give."

⁴ Drake v. White, 117 Mass. 10. To the same effect is Grady v. Schweinler, 16 N. D. 452; 14 L. R. A. (N. S.) 1089, where a bailee agreed to return a horse in as good condition as when received, or pay for it, and he was made liable for the value of the horse which had died while in his possession and without his fault. If the promise had not been in the alternative but merely to return the horse in as good a condition as when received, the liability of the promisor would have been that of a bailee only. Hunt v. Wyman, 100 Mass. 198.

⁵ Duvergier v. Fellows, 1 Cl. & F. 39.

⁶ Fry on Specific Performances, § 1017.

If both the things were destroyed without the fault of the promisor and before the time for performance had arrived, his liability is extinguished although if one or both have merely deteriorated without his fault, his right to choose remains. If one of the things was destroyed by the fault or neglect of the promisor and the other without his fault, he must pay the price of that which was destroyed last although without his fault.⁷

§ 158. **Choice of Alternative.** Unless the contract expressly provides otherwise, the right to choose which of the two alternatives shall be performed rests with the promisor, or the party who is to do the first act.¹ When a party agrees to pay for goods in either six or nine months, and he does not pay at the end of six months, he makes his election not to pay until the end of nine months, and the debt is not due until then.² If a lease is made for seven, fourteen or twenty-one years, the lessee has the right to determine it at the end of either seven or fourteen years, and not the lessor.³

When a party agrees to buy not less than five thousand nor more than eight thousand cubic yards of stone, that gives to the buyer the option of ordering only five thousand.⁴ Defendant agreed to sell to the plaintiff from three to five hundred tons of acid phosphate, during September, and plain-

⁷ Dig. 46, 3, 95.

¹ *Jenkins v. Green*, 27 Beav. 437; *McNitt v. Clark*, 7 Johnson, 465. In Co. Litt. 145A (sec. 219), Coke says: "In case an election be given of two several things, always he which is the first agent and which ought to do the first act shall have the election. As if a man granteth a rent of twenty shillings or a robe to one ~~and~~^{or} his heirs, the grantor shall have the election, for he is the first agent by payment of the one or delivery of the other. So if a man maketh a lease rendering a rent or a robe, the lessee shall have the election *causa qua supra*. But if I give unto you one of my horses in my stable, there you shall have the election, for you shall be the first agent by taking or seizure of one of them. And if one grant to another twenty loads of hazle or twenty loads of maple to be taken in his wood of D., then the grantee shall have election, for he ought to do the first act, *scil.*, to fell and take the same."

² *Price v. Nixon*, 5 Taunton, 338.

³ *Dann v. Spurrier*, 7 Ves. 231; *Powell v. Smith*, L. R. 14, Eq. 85.

⁴ *Ready v. Fulton Co.*, 179 N. Y. 399.

tiff was to give twenty-four hours notice of each order and to pay cash on delivery. After three hundred tons had been delivered and paid for, defendant notified the plaintiff that he would not deliver any more. Plaintiff subsequently demanded two hundred tons additional, and it was held that he was entitled to do so.⁵ But when the agreement is to accept from two to six hundred tons of iron within certain months, the option is with the seller to deliver any number of tons between those limits.⁶

The election is made by notice to the other party or by the tender of the thing. It requires no acceptance. If the choice of the alternative is given by the contract not to the party who is to do the first act but to the promisee, the latter must give notice of his election before the other party can be treated as in default.⁷

When the election has once been made, it is final and cannot afterwards be revoked.⁸ This rule does not apply when there are periodical alternative performances, as if a tenant farmer should agree to pay for the land each year a certain sum of money or a certain quantity of corn. If he pays money the first year, he may pay in grain the second.⁹

§ 159. **Delay or Refusal to Elect.** When the contract fixes a time for the performance, if the promisor does not then elect which alternative he will perform, the right to do so

⁵ *Dambmann v. Lorentz*, 70 Md. 380.

⁶ *Wheeler v. New Brunswick R. Co.*, 115 U. S. 29.

⁷ *Vyse v. Wakefield*, 6 M. & W. 442; *Mallam v. Arden*, 10 Bing. 299.

⁸ *Gath v. Lees*, 3 Hurl. & C. 558; *Schneider v. Foster*, 2 Hurl & N. 4. In the latter case the defendant agreed to pay for goods either by a four months' bill or two per cent. for cash. After delivery of the goods he paid part in cash. It was held that the plaintiff was entitled to sue at once for the balance of the price, since the defendant had exercised his option of paying cash and that he could not pay partly by bill and partly in cash. In *Gath v. Lees*, the contract was to deliver cotton in August or September at seller's option. The seller gave notice that he would deliver in August, but did not do so. It was held that the buyer was entitled to refuse cotton tendered in September.

⁹ *Pothier. Oblig.* 243.

is lost and the choice passes to the other party.¹ When the agreement to pay a definite sum of money provides that it may be discharged in certain kinds of leather at specified prices, the promisor must give notice at or before the maturity of the debt of his election to discharge it by delivery of the leather. If he omits to do so the promise to pay the money becomes absolute.² In a contract to pay \$50 or to deliver a horse on or before a certain day, the right to elect is gone if not exercised at that time.³ The Court said: "When one contracts in the alternative to do one of two things by a given day, he has until the day is past, the right to elect which of them he will perform, but if he suffer the day to elapse without performing either, his contract is broken and his right of election is lost."

If no time be specified in the contract for performance, then a reasonable time is implied and after notice by the promisee, the latter may enforce either of the alternatives or may maintain an action for damages.⁴

§ 160. **Agreement to Pay or Return.** When the contract under which goods are delivered to a party provides that he shall either pay a certain sum for the same by a named day or return them, he makes his election to pay the price by failing to return them at that time. The property in the goods passes subject to be divested by the return.¹ If the contract fixes no time for the exercise of the alternative, then a reasonable time according to the circumstances, is implied.²

This alternative contract to buy or return an article differs from a conditional contract by which the party receiving goods has the right to purchase them if he approves after

¹ *McNitt v. Clark*, 7 Johnson, 465.

² *Plowman v. Riddle*, 7 Ala. 775.

³ *Choice v. Moseley*, 1 Bailey (S. C.) 136.

⁴ *Noyes v. Phillips*, 60 N. Y. 412.

¹ *House v. Beak*, 141 Ill. 300; *Hotchkiss v. Higgins*, 52 Conn. 205; *Buswell v. Bicknell*, 17 Me. 344; *Sturm v. Boker*, 150 U. S. 329.

² *Greacen v. Poehlman*, 191 N. Y. 493.

trial. In the latter case the property does not pass until the condition is fulfilled.³

The contract under which certain property was turned over to the defendants provided that a payment of \$500 should be made upon delivery, which was to be considered an option on the property until March 4, 1901. "After that day, the defendants were to pay an additional sum of \$4,500, or in lieu thereof, to turn back" to the plaintiff all the property delivered by him. The Court said that the contract contained an absolute promise to pay the additional sum at the specified date, or to return the property. "The option given is an option to return, and if it is not returned at the time named, the sale is complete and the promise to pay the balance of the purchase money becomes absolute."⁴

Certain shares of stock were delivered to the defendant under a contract by which he agreed to pay a certain price therefor within a designated time or to return the stock within that time. It was held that the defendant had a right to do either of these two things, and that upon his failure to return the stock within the time specified his promise to pay became absolute.⁵ The person to whom a cow was delivered, agreed to pay a certain sum on a given day or return the cow and pay a lesser sum. The Court said: "Whether the alternative is to return specifically or to pay a certain sum, the principle is the same. The property in the thing passes and the remedy of the former owner is in contract. If the other party neither pays nor returns, he is liable in an action."⁶

³ Ante sec. 145.

⁴ *Guss v. Nelson*, 200 U. S. 298.

⁵ *Stevens v. Hertzler*, 109 Ala. 423.

⁶ *Buswell v. Bicknell*, 17 Me. 344. In *Hotchkiss v. Higgins*, 52 Conn. 205, as innkeeper wrote to the plaintiff: "Please send me one-half barrel Bourbon whiskey and two baskets Piper wine, quarts. What is used will account for and ship rest back to you. I want it for commercial travelers who will be here Friday to dinner. Expect a big time." This expectation was disappointed, for when the liquors arrived, they were attached by a creditor of the inn-keeper. It was held that this transaction was a sale to the inn-keeper, with the alternative right to return, and that the goods were liable to attachment.

When goods are delivered to one under a contract which requires him to sell them and pay the proceeds, or a fixed part thereof, to the party making the delivery, and if the goods are not sold then to be returned, the transaction is a bailment; the title does not pass, and the risk of loss is with the bailor.⁷

⁷ *Middleton v. Stone*, 111 Pa. 589; *Walker v. Butterick*, 105 Mass. 237; *Sturm v. Boker*, 150 U. S. 330.

CHAPTER III

CONTRACTS WITH PENAL CLAUSES— DEPOSITS ON CONTRACTS

§ 161. **In General.** When a contract provides that in the event of a failure to perform it, the party in default shall pay to the other a designated sum of money, or do some other thing by way of compensation for the breach, that stipulation is a penal clause. The sum thus agreed to be paid may be in law either a penalty or liquidated damages. It makes no difference in the construction of the clause whether the parties themselves have designated it as the one or the other.¹

The chief characteristic of the penal clause is that it is a subsidiary and accessory agreement. It does not create a new or additional right for the creditor. Its object is to determine in advance by agreement the amount of the damages which will be due and owing by the promisor in case he fails to perform in time or manner as agreed. That is a great advantage, since it is often difficult for the injured party to prove the exact amount of loss which he suffered from the breach of the contract, and the numerous cases on the measure of damages show how much time and trouble is often required to arrive at a conclusion. This theoretical advantage is considerably diminished in practice by the construction which the Courts place upon these clauses and by their refusal to enforce them except in certain specified cases.

Since the penal clause is a secondary and accessory obligation, it implies the existence of a principal obligation. It follows from this that the nullity or invalidity of the principal contract causes the penal clause to be null. If the principal contract is void or voidable for illegality or mistake or

¹ Cases *inpu.*, sec. 165.

fraud, the penal clause falls with it for the accessory must needs disappear with its principal. On the other hand, the invalidity of the penal clause does not in any manner affect the principal contract for the destruction of the accessory does not involve the principal thing.

§ 162. **Penalty or Liquidated Damages.** In some instances, the sum designated by the contract as payable in the event of a non-performance, is treated as a penalty, in other instances it is considered as liquidated damages. If it is a penalty, it is a sum to be forfeited or a fine inflicted by way of punishment on the party for his breach of contract, and it cannot be recovered, but the other party is entitled only to the actual damages suffered by him, which are to be estimated according to the ordinary rules for the measure of damages. If on the other hand, the sum is treated as liquidated damages, it is the definite amount agreed upon by the parties under conditions fixed by law as the measure of damages for the breach of the contract, and it may be recovered.

The general rule that a contract will be construed so as to carry out the intention of the parties finds an exception in the case of penal clauses. No matter how clearly they may have expressed their intention that the party in default under the contract shall pay a certain sum to the other party as liquidated damages yet such sum cannot be recovered if the Court considers it to be a penalty.¹ One Court has said: "The question whether a sum named in a contract to be paid for a failure to perform shall be regarded as liquidated damages or a penalty, has been frequently before the Courts and has given them much trouble. The cases cannot all be harmonized and they furnish conspicuous examples of judicial efforts to make for parties wiser and more prudent contracts than they had made for themselves. Courts of law have in some cases assumed the functions of Courts of

¹ Bagley v. Peddie, 16 N. Y. 469; Myer v. Hart. 40 Mich. 523.

equity and have relieved parties by forced and unnatural constructions from stipulations highly penal.”²

The true doctrine seems to be that penalties are an exception to the general rule allowing freedom of contract; an exception designed to prevent wrong and oppression and based upon the principle that the Court will not enforce an unconscionable contract.

Prior to the statute of 8 and 9 William III., Chapter 11, Sec. 8, judgment was always rendered for the full amount of the penalty in actions on bonds. Equity in that and similar cases would stay proceedings upon payment of actual damages. But now Courts of law refuse to permit the recovery of penalties and it is no longer necessary to seek the aid of equity. When the penal clause is held to be invalid, it may often happen that the amount recovered by the promisee under the general rules regulating the measure of damages, may exceed the amount named in the contract.³

² *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45.

³ In *Reynolds v. Bridge*, 6 Ellis & B. 528, Erle J. says: “Certainly in some of the cases it was a very large exercise of the power of the court to say, we will see what we should have thought reasonable, and to construe the contract accordingly, and later cases * * tend the other way; it was a very strong absurdity, as it seems to me, when a party had said, ‘I know to what extent I can perform, and I will pay so much if I do not perform,’ to say that upon his non-performance he should not pay so much. If the courts can limit the contract one way they might limit it the other; and then a party might have to pay a larger sum than he ever meant to pay.” In *Sun Printing Ass’n v. Moore*, 183 U. S. 672, Justice White says: “When claimed disproportion has been asserted, it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach, apparent on the face of the contract, and the question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties, whether *bona fide* to fix the damages or to stipulate the payment of an arbitrary sum as a penalty by way of security.” In *Clydebank Eng. Co. v. Don Jose Ramos* [1905] Appeal Cases 6, Lord Darey said: “Courts can only refuse to enforce performance of such an obligation when the payments specified could not possibly have formed a genuine pre-estimate of the creditor’s possible or probable interest in the performance of the principal obligation.”

§ 163. **Effect of a Valid Penal Clause.** When the stipulation is held to be for liquidated damages and not a penalty, the party who failed to perform the contract will not be heard to say that the other party has not suffered any damage from the breach, or that his loss did not equal the sum named. The very object of the clause is to prevent such a controversy. Nor, on the other hand, can the promisee be allowed to say that the damages he suffered were greater than the sum named. The Court can neither reduce nor augment the amount of the damages which the parties themselves have liquidated in advance by their agreement.¹

Since the sum mentioned in the penal clause is designed to take the place of the compensatory damages, that might be recovered in an action for non-performance, it follows that that sum can only be recovered in those cases when there has been such a breach of the principal contract as would entitle the promisee to recover substantial and not merely nominal damages.²

When the contract provides for liquidated damages in case of failure to perform a certain part of it, the promisee is not precluded from recovering damages for breach of another part. If, for instance, a sum is to be paid for delay in doing certain work, the other party may recover damages for defective materials or any other independent breach.

If the contract be such that the promisee is entitled to demand its specific performance, or a writ of replevin, or has the right to ask for an injunction to prevent its breach, in the room and stead of an action for damages, the fact that the contract contains a penal clause, does not prevent a resort to such remedies. The injured party, however, must elect. He cannot demand specific performance or an injunction and also sue for damages.³

¹ *Willson v. Baltimore City*, 83 Md. 203; *Winch v. Mut. Ben. Ice Co.*, 86 N. Y. 618.

² *Bignall v. Gould*, 119 U. S. 499; *Hathaway v. Lynn*, 75 Wis. 186; 6 L. R. A. 551.

³ *Gen. Accident Ass. Co. v. Noel* [1902], 1 K. B. 377.

· § 164. **Difference Between Contract With Penal Clause and Alternative Contract.** It has been shown in the preceding chapter that in an alternative contract there are two principal objects; that two things have been promised, although the obligation is extinguished by the performance of one only. As a rule, in such a contract, the promisor, or party who is to do the first act, has the right to choose one or the other of the two things promised. If one of the objects is destroyed, the obligation is concentrated upon the other. If one of the performances promised is impossible, or unlawful, the contract is valid as to the other which is possible and lawful.

But it is not thus in a contract with a penal clause. Here the object of the agreement is one single thing, which is the principal performance, and the penalty is a mere accessory which is only due in case of non-performance. Therefore, the promisor cannot offer to pay the penalty instead of making performance, nor can the promisee demand the penalty unless the contract has already been broken. In that event, the promisee may in some contracts choose between demanding the penalty or asking for specific performance or an injunction, and to this extent there is an alternative.

If the principal object is unlawful or impossible, or the agreement is voidable for fraud or mistake, the penal clause is without effect, because when the principal has disappeared, there is no foundation left for the accessory.

When a contract provides that a party shall do a certain thing or pay a sum of money, it is a question of construction whether the parties is intended to make an alternative contract or one with a penal clause.

§ 165. **Rules as to Penalties and Liquidated Damages.**

(1) When an agreement contains several stipulations of various degrees of importance, and it is provided that the same sum shall be paid by way of damages for the breach of any of them, that sum is held to be a penalty, although the parties have in express terms stated their intention that

it should be liquidated damages.¹ A clause in a charter party by which the parties bind themselves to ship freight, etc., in the penal sum of the estimated amount of freight to the performance of all and every of their agreements, is not a stipulation for liquidated damages, but a penalty to secure the payment of the amount of damage that either party may actually suffer from any breach of the contract.²

(2) When a penalty or forfeiture is inserted in a contract merely to secure the performance of a collateral object, the latter is considered as the principal intent of the instrument and the penalty is deemed only accessory. In such case, equity will relieve against the penalty because compensation can be made to the other party. But if the Court cannot put it in as good a condition as if the agreement had been performed, no relief will be granted.³

(3) When a greater sum of money is to be paid upon the failure to pay a smaller, it is a penalty.⁴ Legal interest on the money is the measure of damages for the breach of a contract to pay a sum at a certain time.⁵

(4) When the agreement is for the performance of an act or acts and the damages sustained on account of the failure to perform are of a fixed and determinate character such as are readily ascertainable by the jury, in such cases the sum stipulated to be paid is a penalty.⁶

(5) When it is agreed that a certain sum shall be paid for a failure to do a single act or series of acts, and the damages arising from such breach are uncertain or difficult of ascertainment by a fixed standard, then the sum so agreed

¹ *Kemble v. Farren*, 6 Bing. 147; *Bignall v. Gould*, 119 U. S. 499; *Hough v. Kugler*, 36 Md. 186; *Trower v. Elder*, 77 Ill. 452.

² *Watts v. Camors*, 115 U. S. 353.

³ *Klein v. Ins. Co.*, 104 U. S. 90; *Law v. Local Board of Redditch* [1892], 1 Q. B. 127. See 1 *Pomeroy Eq. Jur.* §§ 381, 433; *Cornwall v. Henson* [1900], 2 Ch. 298.

⁴ *Geiger v. Western Md. R. Co.*, 41 Md. 15; *Hough v. Kugler*, 36 Md. 186; *Ashley v. Weldon*, 2 B. & P. 346.

⁵ *Loudon v. Taxing District*, 104 U. S. 771.

⁶ *Chicago House Wrecking Co. v.* U. S. 45, C. C. A. 343; 53 L. R. A. 122; *Burrell v. Daggett*, 77 Me. 545; *Geiger v. Western Md. R. Co.*, 41 Md. 15; *Streeper v. Williams*, 48 Pa. 450

to be paid may be recovered as liquidated damages.⁷ Therefore, upon the sale of the good will and stock in trade of a business, an agreement by the seller not to conduct a similar business within designated limits, under forfeiture of a certain sum for a breach, is to be regarded as liquidating the damages.⁸

For this reason also when a building contract, or one for other work, provides that if the work be not completed by a given day, the contractor shall pay a certain sum for each day's delay, the stipulation, at least when the amount named is not excessive, is generally treated as one for liquidated damages and not as a penalty.⁹ In a case when different bids were submitted for doing certain work, the largest price being for the shortest time of delivery, the Court said that "acceptance of the bid for shorter time is evidence that the element of time is of essence, and a stipulated deduction of an amount per day equivalent to the difference between long and short time for delivery is to be construed as liquidated damages and not as a penalty, though the word penalty may have been used in some portions of the contract."¹⁰

When the contract price for the doing of certain concrete work was nearly fourteen thousand dollars, and the building was designed for the plaintiff's established and increasing business, so that it would be difficult to estimate the money loss to him caused by delay in obtaining possession of the new building, an agreement to pay fifty dollars a day for

⁷ *Guerin v. Stacy*, 175 Mass. 597; *Emery v. Boyle*, 200 Pa. 249; *Willson v. Baltimore City*, 83 Md. 203; *Sun Printing Ass'n v. Moore*, 183 U. S. 642; *McCullough v. Moore*, 111 Ill. App. 545.

⁸ *Cushing v. Drew*, 97 Mass. 445; *Maxwell v. Allen*, 78 Me. 32; *Tode v. Gross*, 127 N. Y. 480; 13 L. R. A. 652; *Glassworthy v. Strull*, 1 Exch. 657. But see *Radloff v. Haase*, 196 Ill. 367; *Wilkinson v. Colley*, 164 Pa. 35; 26 L. R. A. 114, where under the circumstances of these cases the sums named were held to be penalties.

⁹ *Ward v. Hudson River Bldg. Co.*, 125 N. Y. 230; *Hall v. Crowley*, 5 Allen, 304; *Fruin v. Crystal Ry. Co.*, 89 Mo. 397; *Wallis Iron Works v. Monmouth Park Ass'n*, 55 N. J. L. 132; 19 L. R. A. 456; *Legge v. Harlock*, 12 Q. B. 1015; *Clydebank Eng. Co. v. Don Jose Ramos* 11. R. [1905], A. C. 6.

¹⁰ *U. S. v. Bethlehem Steel Co.*, 205 U. S. 105.

each day's delay in completing the work is not excessive and may be recovered as liquidated damages.¹¹ If the sum fixed as damages for each day's delay in the completion of the building beyond the prescribed time is itself proper to be recovered as liquidated damages, the fact that the delay by the contractor was continued for a long time does not render the sum excessive.¹² But when a contract for the repair of a house of the rental value of twenty-five dollars per week provides that one hundred and fifty dollars per week shall be paid for delay in the completion of the work, such sum is a penalty.¹³

(6) When the price for which property is sold is payable in instalments, a provision that upon failure to pay an instalment, the whole price shall become due, is not a penalty.¹⁴ So a provision in a mortgage that upon failure to pay the interest punctually as covenanted the whole principal shall become due and demandable is not in the nature of a penalty or forfeiture.¹⁵

§ 166. **Deposit of Money in Aid of Contract. Earnest.** The general rule is that when money or property is deposited by one of the parties to a contract with the other, or with a third party, in aid of the contract, it is treated as a guarantee of the performance of the contract, or as being made on account of the purchase price. If the payer of the money makes default in performing the contract, the deposit may be retained by the payee.¹ So if the payer disables himself

¹¹ *United Surety Co. v. Summers*, 110 Md. 95. So in *Curtis v. Van Bergh*, 161 N. Y. 117, it was held that \$50 a day was not an excessive sum to pay for delay in the completion of a building. In *Iroquois Furnace Co. v. Wilkins Co.*, 181 Ill. 582, it was ruled that a contract providing that \$50 a day should be paid for delay in the delivery of machinery which was to be delivered at different times, imposed a penalty.

¹² *United Surety Co. v. Summers*, 110 Md. 95.

¹³ *Clement v. Schuylkill River, etc., Co.*, 132 Pa. 445.

¹⁴ *Dean v. Nelson*, 10 Wallace, 158.

¹⁵ *Schooley v. Romaine*, 31 Md. 574; *Mobrey v. Leckee*, 42 Md. 474.

¹ *Moore v. Dunham*, 63 N. J. Eq. 96; *Sprague v. Booth* [1909], App. Cas. 576; *Hinton v. Sparks*, L. R. 3, C. P. 161. In *Howe v. Smith*, L. R. 27, Ch. D. 101, Fry L. J. said that when no terms are expressed

from performing or repudiates the contract, the deposit is forfeited.²

A party who has advanced money or done an act in part performance of an agreement and then refuses to proceed to its ultimate conclusion, the other party being ready to fulfill his obligation, is not allowed to recover for what has been thus advanced or done.³ The hirer of a horse and wagon entered into a contract, stating that "to secure the return of all property hired by said party of the second part in good order and condition, said party of the second part does hereby deposit with said party of the first part, the sum of five hundred dollars." It was held that, although the failure of the hirer to return the property was not owing to his negligence, he could not recover the amount deposited.⁴

When a contract for the sale of land provides for the payment of a sum on account of the price, which is to be retained by the vendor if the purchaser fails to complete the payments, the agreement will be enforced unless the amount is unconscionable.⁵ In such case, to allow the pur-

as to the deposit the implied terms are "that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer, it shall remain the property of the payee. It is not merely a part payment but is then also an earnest to bind the bargain, and creates, by the fear of its forfeiture, a motive in the payer to perform the rest of the contract." In *Soper v. Arnold*, L. R. 14, App. C. 435, Lord Macnaghten said: "The deposit serves two purposes—if the purchase is carried out it goes against the purchase money—but its primary purpose is this, it is a guarantee that the purchaser means business, and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not."

² *Ferris v. Spooner*, 102 N. Y. 10.

³ *Davis v. Hall*, 52 Md. 682.

⁴ *Barrere v. Soms*, 113 Cal. 97.

⁵ *Pinkney v. Weaver*, 216 Ill. 196. In *Keefe v. Fairfield*, 184 Mass. 334, a contract for the sale of land, the price being payable in monthly instalments, provided that in the event of a failure to pay an instalment for twenty days, the vendor should have the right to avoid the contract and retain all the money paid as liquidated damages. It was held that this agreement should be enforced and that the purchaser was not entitled to claim that the actual damages caused by his breach were less than the amounts paid by him. In

chaser to abandon his contract and yet recover the deposit would be to enable him to take advantage of his own wrong. But if time is not of the essence of the agreement, and the purchaser offers to pay the balance due after the time limited, he is permitted to do so, and the deposit is not then forfeited.⁶

In a contract by which Wallis agreed to sell an estate valued at £70,000, to Smith, who was to develop the same, erect houses, etc., it was provided that Smith should pay into a bank £5,000 of the purchase money as security for the performance of the agreement, which was to be laid out on the work. The contract provided that if Smith should commit a substantial breach of it, then the deposit was to be forfeited by way of liquidated damages, and the contract to be void. It was held that this bargain of the parties should be carried out.⁷

A contract for the purchase of land stated that £5,000, "part of the purchase money of £12,500, has been paid as a deposit and in part payment of the purchase money." There was no provision as to what should be done with the deposit if the contract was not performed. After a default by the purchaser, the vendor resold the land for the same price. In an action to recover the deposit, it was held that the vendor was entitled to retain it and that his right to do so was not affected by a stipulation in the contract providing that if the purchaser should fail to comply, then the vendor might re-sell, and any deficiency at the second sale should be recovered as liquidated damages.⁸

Scofield v. Tompkins, 95 Ill. 190, defendant agreed to pay a certain sum for land by a time limited under a contract giving to the plaintiff the right in case of default to retain any money paid on account, also to declare the contract void and to sue for the whole of the price as liquidated damages, retaining meanwhile title and possession. In was held that the sum named could not be recovered.

⁶ *Sprague v. Booth*, L. R. [1909], App. C. 576; *In Re Dagenham Dock Co.*, L. R. 8, Ch. App. 1022; *Cornwall v. Henson*, L. R. [1900], 2 Ch. 298.

⁷ *Wallis v. Smith*, L. R. 21, Ch. D. 243, cited in *Willson v. Baltimore City*, 83 Md. 214.

⁸ *Howe v. Smith*, L. R. 27, Ch. D. 89.

When money is deposited by a tenant to secure his performance of the lease, and is to be retained by the landlord in case of a breach, the deposit is a security only. If the landlord re-enters, he has no claim to the deposit except as to rent then due.⁹

These rules as to deposits apply also to deposits made by a purchaser at an auction sale.¹⁰

If the parties rescind by agreement the contract under which the money was paid, or if its non-performance was owing to the default of the person to whom the money was paid, such as a failure of his title to the property, in all such cases the deposit may be recovered.¹¹

The special terms of the agreement upon which the deposit was made may operate to vary or restrict the application of these general rules. The right to retain the deposit is in each case a question of the construction of the contract.¹²

A sum in aid of the contract is sometimes called the earnest. It is lost by the failure to perform.¹³

⁹ *Caesar v. Rubinson*, 174 N. Y. 492. See also, *Claude v. Shepard*, 122 N. Y. 397.

¹⁰ *Donahue v. Parkman*, 161 Mass. 413. But in *Poulson v. Ellis*, 60 Pa. 134, the payer was allowed to recover the balance of the deposit after deducting the actual damages suffered.

¹¹ *Cockcroft v. Muller*, 71 N. Y. 367; *Gosbell v. Archer*, 2 Ad. & E. 508; *Thomas v. Brown*, L. R. 1, Q. B. D. 714; *Moeser v. Wisker*, L. R. 6, C. P. 120. The German Civil Code, Art 338, provides: "If the holder of the earnest demand compensation for non-performance, the earnest shall, in case of doubt, be credited, or, if this cannot be done, shall be returned on payment of the compensation" (*Wang.*).

¹² *Essex v. Daniel*, L. R. 10, C. P. 538; *Howe v. Smith*, L. R. 27, Ch. D. 89.

¹³ In *Howe v. Hayward*, 108 Mass. 55, the Court said: "The idea of earnest in connection with contracts was taken from the civil law. * * As used in the Statute of Frauds, earnest is regarded as a part payment of the price." In *Howe v. Smith*, 27 Ch. D. 102, Fry L. J. said that the word *earnest* itself and the law relating to it were derived from the *arra* of Roman law through Braeton. In Institutes iii, 23, it is said that *arra* (earnest) is evidence of the completion of the contract, and, "where earnest has been given and either party refuses to perform the contract, that party whether the agreement be in writing or not, if purchaser, forfeits what he has given, and if vendor is compelled to restore double what he has received, even though there has been no express agreement in the

If the deposit be not made a part performance of the contract but is collateral to the same, and a mere guarantee that its provisions will be observed, and if the making of the deposit is not a part of the thing to be done in execution of the contract, but is required solely as a condition precedent to entering into the contract, which relates to something else, then such deposit will not be treated as liquidated damages merely because it is a deposit, but will be either liquidated damages or a penalty as the circumstances of the case may indicate.¹⁴

matter of earnest." Under Justinian's Code, 4, 21, 17, the parties could agree that upon forfeiture of the earnest either party could rescind the contract.

¹⁴ *Willson v. Baltimore City*, 83 Md. 203. In this case a municipal corporation advertised for sealed proposals for the supply of certain articles, and plaintiff made a bid, according to a prescribed form which provides that the name of a surety must be written in the proposal, that each bid must be accompanied by a certified check payable to the municipality, and that "if the successful bidders enter into contract with bond without delay their checks will be returned to them as will those of the unsuccessful bidders." The contract was awarded to the plaintiff, the lowest bidder, who had sent in with his bid a check for \$500, but he was afterwards unable, without any fault of his own, to obtain the suretyship of the person named in his bid, or that of any other surety. The city then advertised again for bids and the contract was awarded to another bidder for a less sum than that offered by the plaintiff, so that the city not only lost no money by the failure of the plaintiff to give bond, but saved a considerable sum. It was held that since the city had suffered no loss in consequence of plaintiff's failure to give bond, he was entitled to recover his deposit.

CHAPTER IV.

DIVISIBLE CONTRACTS

✓ § 167. **What is a Divisible Contract.** A party may in the same contract undertake the performance of several things. The question then is whether the promises constitute a unity, or whether they are to some extent independent stipulations. In the first case there is only one obligation; in the second, there are several obligations. In the first case the contract is called entire; in the second it is called divisible, or severable.

If the obligation is one and entire, then the promisee can, as a rule, refuse to accept a part performance, for he is entitled to demand that the promisor's offer to perform should embrace the whole undertaking. But if the several obligations, although bound together, are yet divisible, and the consideration is apportioned to each obligation, then a failure by one party to perform fully one of these obligations does not authorize the other party to rescind the contract as to the other obligations, unless that failure amounts to a repudiation of the contract as a whole. Such default gives the other party a right of action for damages, but does not entire, and a failure to perform one part it would authorize a rescission.

A divisible contract is, therefore, one contract, made up of several distinct and yet connected subsidiary contracts. If, for instance, a man should order from the same furnisher, at the same time, a coat, a hat and a pair of shoes, separate prices being fixed for each, and the furnisher after supplying the coat and the hat, should neglect to make the shoes, the other party would not be justified in rescinding the contract and returning what he had received. His remedy would be to sue for such damages as he has sustained or to recoup them in an action against him for the price of what he had

received. But if, in the case supposed, one lump sum was to be paid for all the articles, then the contract would be entire, and a failure to perform one part of it would authorize a rescission.

An agreement to sell a town lot and also certain personal property, all for a lump sum, is an entire contract.¹ Apportionment of the consideration to the different items is generally necessary in order to make the contract a divisible one.² A contract for the sale of 800 tons of coal to be delivered on vessels as sent for it during August and September is entire, and nothing is payable until all has been delivered.³

But apportionment of the consideration to each part performance does not necessarily make the contract divisible. If each part delivery is not of a thing which has an independent value, or if such part is a constituent of a whole, then the circumstances that the parts are to be separately delivered and paid for does not make the contract divisible; on the contrary, it is a unit. A subscription to a publication in ten portfolios at a stated price for each part, deliverable at intervals of two months, to be paid for on delivery, is a contract one and entire, although providing for the performance of different things at different times.⁴

Defendant ordered twelve dozen pairs of "pants" according to samples at different prices for each dozen. When delivered, defendant considered that only one dozen pairs correspond with the sample. These he kept and returned the others. In an action by the seller, it was held that the contract was divisible; that the defendant could keep one lot and return the others; that when there is a purchase at the same time of different articles at different prices, the contract is severable as to each article, unless otherwise provided.⁵

¹ Scheland v. Erpelding, 6 Oregon, 258.

² Moore v. Bonnet, 40 Cal. 251. See Wooten v. Walters, 110 N. C. 251.

³ Shinn v. Bodine, 60 Pa. 182.

⁴ Barrie v. Earle, 148 Mass. 1.

⁵ Slayden Mills v. Spring, 116 Ill. App. 27.

The most common instances of divisible contracts are sales of goods to be delivered in instalments, each instalment to be paid or settled for as delivered.

§ 168. **Failure of Performance as to One Item of Divisible Contract.** The general rule, as established by the weight of authority, is that the failure of a seller to deliver one instalment at the time specified, or a default as to its quantity or quality, justifies the other party in refusing to accept that particular delivery, but it does not authorize him to rescind the whole contract as to future deliveries, unless the conduct or language of the seller is such as to amount to a repudiation of the contract, or evinces either an intention not to abide by it, or an inability to do so. And in like manner, the failure of the buyer to pay for any one instalment at the time specified or to take it away when offered, gives a right of action to the seller, but does not authorize him to rescind the contract as to future deliveries, unless the conduct of the seller shows that he does not intend to perform the contract.

In order to determine whether a default by one party as to one instalment or as to the performance of one of the subsidiary obligations, justifies rescission by the other party, it is necessary to consider the nature of that default and the circumstances upon which it was made.

"The general principle," said Lord Esher,¹ "to be deduced from these cases² is that where in a mercantile contract of purchase and sale of goods, to be delivered and accepted, the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfil his part in any one or more of these deliveries, does not absolve the other party from the duty of tendering or accepting in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and although the failure of the party suing, as to one or more deliveries, was incurable in the sense that he never could fulfil his undertaking to accept or deliver the

¹ In *Renter v. Sala*, 4 P. C. D. 239.

² *Simpson v. Crippen*, L. R. 8, Q. B. 14, and others.

whole of the specified quantity. The reasons given are that such a breach by the party suing, is a breach of only part of the consideration, moving from him; that such a breach can be compensated in damages without any necessity for annulling the whole contract; that the true construction of such a contract is that it is not a condition precedent to an obligation to tender or accept a part that the other party should have been, or should be, always ready and willing and able to accept or tender the whole. A consideration of the mercantile consequences of otherwise construing such contracts, seems to me to fortify the one construction and to condemn the other."

In a recent case,³ Farwell, L. J., says: "The principle appears to me admirable."

In *Blackburn v. Reilly*,⁴ the Court said: "In contracts for sale of goods to be executed by a series of deliveries and payments, defaults of either party with reference to one or more stipulated acts will not ordinarily discharge the other party from his obligation, unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms. * * This rule leaves the party complaining of a breach to recover damages for his injury on the normal principle of compensation without allowing him the abnormal advantage that might enure to him from an option to rescind the bargain."

The reason why a default, without more, by a party as to the delivery or payment of one instalment does not authorize the other party to annul the contract, is that such default is not necessarily or generally a substantial breach—it does not go to the root of the whole contract. It is only a failure of performance as to a subsidiary part for which adequate compensation can be given by an action for damages or by way of recoupment.⁵ The breach may be substantial as to

³ *Jackson v. Rotax Motor Co.* [1910], 2 K. B. at p. 947.

⁴ 47 N. J. L. 290, followed in *Gerli v. Poidebard Silk Mfg. Co.*, 57 N. J. L. 438; 30 L. R. A. 65.

⁵ See also, in support of this principle *West v. Bechtel*, 125 Mich. 144; 51 L. R. A. 791; *Myer v. Wheeler*, 65 Iowa, 390; *Monarch Cycle Co. v. Royer Co.*, 105 Fed. Rep. 524, and cases *post* in § 170.

one instalment, but not substantial when considered in connection with the whole contract.

§ 169. **Cases to the Contrary.** There are some cases which hold that any default by either party in the performance of one of the items of a divisible contract authorizes the other party to rescind the whole contract.¹ The chief of these cases is *Norrington v. Wright*,² where there was a contract for the sale of 5,000 tons of iron rails to be shipped from an European port at the rate of about 1,000 tons per month, beginning in February, but the whole contract to be shipped before August. Only 400 tons were shipped in February and 885 in March. The buyer accepted and paid for the February shipment on its arrival in March, in ignorance of the fact that no more had been shipped in February, and he was first informed of that fact after the arrival of the March shipment. It was held, first, that this contract was a single contract for the sale and purchase of 5,000 tons iron rails, and that the subsidiary provisions as to the shipping in different months, and as to paying for each shipment upon its delivery, did not split up the contract into as many contracts as there should be shipments or deliveries; and, second, that on account of the failure of the seller to ship about 1,000 tons in February, the buyer was entitled to rescind the contract.

The first ruling in this case to the effect that the contract was entire is contrary to the great mass of authority and seems to be untenable. The other ruling, that the default in making the first delivery authorized a rescission of the whole contract, while not so clearly against the weight of authority, is at least open to much question. In *Gerli v. Poidebard Silk Mfg. Co.*,³ the Court said in regard to *Nor-*

¹ *Ross Mehan Co. v. Royer Wheel Co.*, 113 Tenn. 370; 68 L. R. A. 829; *Pope v. Porter*, 102 N. Y. 366; *Baltimore City v. Schaub Bros.*, 96 Md. 534. Cf. *Enterprise Mfg. Co. v. Oppenheim*, 114 Md. 368; *Hess Co. v. Dawson*, 149 Ill. 138.

² 115 U. S. 188.

³ 57 N. J. L. 438; 30 L. R. A. 67.

rington v. Wright: "I am not sure that I perceive definitely the principle upon which this decision was rested. But the case seems now to be cited for the following paragraph in the opinion of the Court: 'The seller is bound to deliver the quantity stipulated and has no right * * * to compel the buyer to accept a less quantity; * * * and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.' I cannot but think that there is here some confusion of thought. If a contract of sale requires the delivery of all the goods at once, and the seller tenders only part at the time specified, certainly the buyer may refuse to accept the part, but it is scarcely accurate to say his refusal is based upon a rescission of the contract. He has simply refused to do what he never agreed to do. But if the goods are to be delivered in instalments at different times and the seller tenders one instalment on the day specified, then if the buyer refuses to accept it, plainly his refusal must rest upon a different foundation. He had agreed to accept such a tender, and his refusal can be justified only on the idea that he has become released from that agreement. That is to say, with reference to the point we are now considering, it must appear that his agreement to accept the instalment tendered was dependent upon the true performance by the seller of another promise, which he had failed to perform."

It would seem that the cases which hold that any default by one party as to one item of such a contract authorizes the other party to rescind are in conflict with the American Sale of Goods Act, in force in some States, which provides as follows, in Sec. 63:

"Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of, or to pay for, one or more instalments, it

depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken."

§ 170. **Illustrations. What Breach Authorizes Rescission.** A contract to deliver 50,000 tons of coal in a year, the shipments to be made at the rate of 6,000 tons per month, at buyer's option, upon notices to be furnished on a certain day in each month for the quantity required for the succeeding month, is a severable contract. When part performance of such contract has been made, the fact that other and inferior coal was substituted for that contracted for, in a delivery, does not give a right to rescind—the proper remedy being by way of set-off or by an action for damages.¹ So an agreement for the sale of 300 barrels of flour, to be delivered in lots of 100 barrels each, payable on delivery, is severable.²

If inferior goods are substituted in one instalment the other party is not bound to accept them.³ But if he does accept them, the receipt of a subsequent instalment is not a waiver of the right of action growing out of such improper delivery.⁴ There are in a divisible contract as many causes of action as there are breaches.⁵ But a failure to deliver all of one instalment does not entitle the buyer to demand that the deficiency be made up upon the delivery of the next instalment.⁶

While mere non-payment of an instalment, or the mere improper delivery of one, will not authorize a rescission of

¹ *Scott v. Kittaning Coal Co.*, 89 Pa. 231.

² *Sawyer v. Chicago & N. W. Ry Co.*, 22 Wis. 402.

³ *Cahen v. Platt*, 69 N. Y. 348.

⁴ *Sawyer v. Chicago N. W. Ry. Co.*, 22 Wis. 402. *Cf. Gill v. Benjamin*, 64 Wis. 362.

⁵ *Broumel v. Rayner*, 68 Md. 50. *Cf. Lorillard Clyde*, 122 N. Y. 41.

⁶ *Johnson v. Allen*, 78 Ala. 387.

the contract,⁷ yet if the default in an item be accompanied by an announcement that the party will not fulfil the contract according to its terms, the other party is at liberty to rescind the same, whether such default be after part performance or not.⁸ So when the contract was for the sale of six carloads of corn, each carload to be paid for as delivered, the refusal to pay for any carload, without sufficient reason, authorizes a rescission by the seller.⁹

There was a contract for the sale of 6,000 to 8,000 tons of coal to be delivered into plaintiff's wagons at defendant's collieries in equal monthly instalments during twelve months. During the first month, plaintiff sent wagons for only 158 tons, and thereupon defendant annulled the contract. It was held that he was not entitled to do so because each delivery of coal was required to be delivered under a separate contract and to be paid for separately.¹⁰

In *Mersey, etc., Co. v. Naylor*,¹¹ the contract was for the sale of 5,000 tons steel blooms, delivery to be of 1,000 tons monthly, commencing January, payment within three days after receipt of shipping documents. The buyer failed to pay for the first shipment because there had been certain proceedings in the affairs of the vendor company and he was advised by a solicitor not to do so. It was held that the seller was not entitled, on account of this default in payment, to rescind the contract. The precise point decided "was that the failure of the buyer to pay for the first instalment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind and to decline to make further deliveries under it."¹¹

When the contract is to furnish bricks for paving purposes, payment to be made monthly for those delivered in

⁷ *Freth v. Burr*, L. R. 9, C. P. 208.

⁸ *Withers v. Reynolds*, 2 B. & Ad. 882. See also, *Stephenson v. Cady*, 117 Mass. 6.

⁹ *Rugg v. Moore*, 110 Pa. 236.

¹⁰ *Simpson v. Crippen*, L. R. 8, Q. B. 14.

¹¹ L. R. 9, App. Cases, 434.

the preceding month, the contract is divisible, and a failure to pay for one instalment does not in itself entitle the seller to rescind the contract.¹²

The failure of a buyer to pay for several deliveries justifies a rescission of the contract by the seller.¹³ When inferior and defective goods are substituted in three deliveries for those called for by the contract, the buyer is entitled to rescind.¹⁴ His right to rescind is not waived or lost unless he delays for an unreasonable time in notifying the seller of his purpose after he acquires knowledge of the defective deliveries, nor is the right to rescind lost because the buyer made use of such defective goods before he acquired knowledge of the defect.

In *Jackson v. Rotax Motor Co.*,¹⁵ the defendant ordered from a manufacturer in Paris a large number of motor horns of different kinds at prices as specified. The delivery was to be made as required, and to be paid for on delivery. The horns were shipped in nineteen cases on different dates in May and June, the first delivery containing four cases. The buyer accepted the first instalment, but rejected the others, because they were not merchantable, the horns being dented and not polished. It was held that the acceptance of the first instalment did not preclude the buyer from rejecting the later ones, which he was justified in doing, since they were unmerchantable. It was also held that this was not an entire contract for the sale at a lump price of an entire quantity of goods, but was for deliveries from time to time as required, and was much like the case of *Simpson v. Crippin*, where each instalment was really a delivery under a separate contract; that when the buyer accepts and pays for the first instalment, which is in accordance with the contract, he is not bound to pay for a subsequent instalment not in accordance with the contract; that

¹² *Brick Mfg. Co. v. Herrick*, 126 Iowa, 721.

¹³ *Eastern Forge Co. v. Coburn*, 182 Mass. 592; *McGrath v. Gegner*, 77 Md. 331.

¹⁴ *Enterprise Mfg. Co. v. Oppenheim*, 114 Md. 368.

¹⁵ [1910] 2 K. B. 937.

in this case each batch of horns, as and when required, became the subject of a separate contract; that when a part of a batch was defective, the buyer was entitled to reject all of it and was not bound to go picking and choosing in order to select those articles which were merchantable.

A contract for the sale of 2,000 cases of canned tomatoes of a certain quality provided that they should be shipped to the buyer in carload lots of 500 cases, each lot to be paid for upon receipt of bill of lading. The first two lots were paid for, but upon receipt of the third carload of 500 cases, the buyer refused to pay for the same, alleging that the goods received in the first two shipments were not of the quality called for by the contract, and that the third lot also had been rejected by his sub-vendee, and claimed to be entitled to a deduction on that amount. The seller denied this claim and refused to make final delivery, although requested so to do, and brought suit to recover for the third shipment. The defendant claimed to be entitled to recoup against the price of the third carload lot the damages resulting from the seller's failure to ship the fourth lot, as also on account of the inferior quality of those previously delivered. It was held that the failure of the buyer to pay for the third shipment, under these circumstances, justifies the seller in refusing to make the fourth delivery, and that the defendant was not entitled to damages therefor by way of recoupment.¹⁶

§ 171. **Default at the Outset.** A distinction is made by some cases between a failure to perform a divisible contract at the outset, and a failure in the performance of a subsequent item. When the default is *in limine*, when the seller, for example, fails to begin performance at the stipulated time, or then makes an improper delivery, the buyer is justified in rescinding the whole contract.¹ In January the

¹⁶ Webster v. Moore, 108 Md. 572.

¹ Pope v. Porter, 102 N. Y. 366. And see Houck v. Muller, 7 Q. B. D. 92. But the doctrine of other courts is that there is no difference in legal effect between a breach of a divisible contract at its outset and a breach in the performance of a subsequent item. Gerli v. Poidebard Silk Mfg. Co., 57 N. J. L. 432.

King Philip Mills, which were about going into operation, agreed with S. to sell him the product of 400 looms up to July 1st, the goods to be of a certain width and weight, and to be delivered in lots of 1,000 pieces. Payment was to be made thirty days after the delivery of each lot. The mill was expected to be in full operation by April 1st, but deliveries were to be made earlier if possible. About April 17th two lots of 1,000 pieces each were delivered, which pieces were deficient in width and weight. It then appeared that the mills, in order to fulfil the contract, must obtain new machinery, and, upon learning this, S. rescinded the contract. In an action by the Mills against S. for goods subsequently and before July 1st manufactured, tendered and refused, it was held, 1. That the contract was for successive deliveries as manufactured. 2. That the mills having failed to make the first deliveries according to the contract, could not compel S. to take the goods subsequently offered, and S. was justified in rescinding the contract. 3. That in contracts for successive deliveries the vendor cannot fail in the earlier deliveries and still hold the purchaser for the later ones.²

§ 172. **Waiver of Default.** The failure to perform one of the stipulations may be waived by the other party, and no right then exists to rescind the contract on account of it. Thus, where H. agreed in January to furnish W. with 200 tons of pig iron, to be delivered in quantities of about 18 tons per month, and no deliveries were made until March, when W. sent for two small parcels on trial, and in May W. refused to accept any delivery and rescinded the contract on account of H.'s failures to make deliveries in the preceding four months, it was held, 1. That, as the iron was to be delivered in monthly instalments, and to be paid for separately, a failure to make one delivery would not necessarily affect the right of the buyer to receive it. 2. That it was reasonable to infer from the fact of sending to H. for iron in March that W. considered the contract as subsisting at that time.

² King Philip Mills v. Slater, 12 R. I. 83.

3. That if the jury found that W. at that time regarded the contract as in force, all previous defaults were waived by him and could not afterwards be set up as reasons for annulling the contract. 4. That if the April default was not waived, W. had a right to annul the contract on this ground, provided he gave due notice to H. of his determination to do so.¹ So where A. contracted with B. to deliver him 12,000 carboys of oil of vitriol in monthly instalments of 2,000 carboys during six months, beginning in September, payment to be made monthly in B.'s paper at four months, and A. failed to make any delivery in September, but made partial deliveries in October and November with B.'s consent, which were paid for when B. refused to receive any more, it was held, 1. That the failure to make the first delivery was waived by B. 2. That the contract was divisible and B. was not justified, under the circumstances, in rescinding.²

¹ *Bollman v. Burt*, 61 Md. 415.

² *Md. Fer. Co. v. Lorentz*, 44 Md. 218.

PART VI

EXTINGUISHMENT OF CONTRACT

§ 173. **Modes of Extinguishment.** The legal obligation created by a contract, the contractual bond, may be discharged, the *vinculum juris* unloosed, and the liability of the promisor brought to an end in different ways, which may be classified as follows:

1. By agreement of the parties before breach. The agreement may be (a) A waiver or rescission of the contract; (b) The substitution of a new contract in the place of the old, which constitutes a novation.

2. By virtue of a provision in the contract which causes it to be extinguished upon the happening of some event or at the option of one of the parties by way of a condition subsequent.

3. By performance of the contract.

4. By impossibility of performance.

5. By cancellation of the contract for some defect such as fraud or undue influence.

6. By such a breach of the contract by one party as puts an end to the liability of the other to perform on his side.

7. By the merger of a simple contract into a sealed contract of similar import.

8. By the alterations of a written contract by one party without the consent of the other.

9. By a discharge in bankruptcy or insolvency.

The right of action which the injured party possesses on account of a breach of the contract by the other exists until it is extinguished in one of the following ways:

1. By release.

2. By accord and satisfaction.

3. By a judgment.

4. By becoming barred under the Statute of Limitations.

The normal mode of extinguishing a contract is by performance. A promisor can only establish his release from the obligation by showing, either that he has done that which he promised to do, or that he has some legal excuse for non-performance, some reason why he was not bound to perform, such as those mentioned in the foregoing categories. Consequently, there are, from one point of view, only two ways of extinguishing a contract—one is its performance, and the other some legal excuse for non-performance. J

CHAPTER I

DISCHARGE OF CONTRACT BY AGREEMENT

§ 174. **Waiver or Rescission.** A contract is formed by the mutual agreement of the parties, and it may, before breach, be rescinded in the same way. But to annul or set aside a contract requires the consent of both parties as it did to make it. There must be the same meeting of minds, the same agreement to modify or abandon it that was necessary to make it.¹

When the parties agree to rescind a contract executory on both sides the mutual promises to discharge are the consideration for each other. The intention of both parties to rescind must be clearly established by words or by conduct.² If money has been paid in part performance of the contract, it may be recovered under the common counts.³

If the contract has been fully executed by one party, it is generally said the other cannot be released from his liability without a consideration.⁴

But there is some authority and a good deal of reason for the rule that, although one party has performed his part of the contract, he may, *before a breach*, release the other party from his obligation to perform in whole or in part by an agreement merely, without consideration.⁵ Professor Wil-

¹ *Wheeler v. New Brunswick R. Co.*, 115 U. S. 34.

² *Lauer v. Lee*, 42 Pa. St. 165; *Murray v. Harway*, 56 N. Y. 337.

³ *Johnson v. Evans*, 8 Gill. 155. *Cf.* *Gunby v. Slater*, 44 Md. 250.

⁴ *Collyer v. Moulton*, 9 R. I. 90; *Lefferman v. Renshaw*, 45 Md. 119.

⁵ *Hathaway v. Lynn*, 17 Wis. 551; *Dobson v. Espie*, 2 Hurl. & N. 79. In *Lefferman v. Renshaw*, 45 Md. 119, where the contract was to sell certain property for \$4,000 in gold, it was held that if the vendor executes a deed upon payment of \$4,000 in currency, he had waived strict compliance with the terms of the contract. In some cases the acceptance of goods or of work not in conformity with the contract is a waiver of the right to claim compensation for non-performance. *Kernan v. Crook, Horner & Co.*, 100 Md. 210. In other cases it is not a waiver. *Canton Lumber Co. v. Liller*, 107 Md. 146; *Sumwalt Co. v. Knickerbocker Ice Co.*, 112 Md. 437. In an action on a bond, the defendant may show by parol that plaintiff

liston⁶ holds that, as a rule, a consideration is necessary to support a release by one party of an unilateral contract, but, nevertheless, says, "Suppose the promisee informs the promisor that performance will not be required, and, relying on this, the promisor is not ready to perform at the day, or has so altered his position that he cannot perform at all. Though estoppel is not ordinarily a substitute for consideration, justice demands that, in the cases supposed, the promisee should not be allowed to hold the promisor liable for his non-performance. It may well be that a recognition of this possibility of injustice here suggested led early judges to hold exoneration good without consideration. At the present day it would seem better to apply the doctrine of estoppel *in pais* when necessary, but in general to require consideration."

§ 175. **Novation—Substituted Contract.** A contract is discharged by agreement when a new one is put in its place. The two things should be conceived of as a unit, not as the rescission of one contract for the purpose of making another but as a transformation of the first into the second.¹ This is called a novation, because it puts a new contract, a *nova obligatio*, in the place of a former one.² There must be the *animus novandi*, which may appear either by an express rescission of the first contract, or by such an introduction of new terms or new parties as implies an abandonment of it.³

A novation may be effected in three ways:

has waived compliance with its provisions; and he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. *Franklin Ice Co. v. Hamill*, 5 Md. 170. And so where the contract is to do certain work by a certain time, a party who prevents performance by that time cannot rely upon the stipulation. *Underwood v. Wolf*, 131 Ill. 425.

⁶ Williston's Edition of Wald's Pollock on Contracts, 819.

¹ *Novatio est prioris debiti in aliam obligationem transfusio atque translatio.* Dig. 46, 2, 1.

² *Novatio enim a novo nomen accipit et a nova obligatione.* Dig. 46, 2, 1.

³ *McCreery v. Day*, 119 N. Y. 1; *Howard v. Railroad Co.* 1 Gill. 311.

(1) Between the original parties, when the promisor contracts a new obligation to the promisee taking the place of the former one, which is thereby extinguished.⁴

(2) When a new debtor or promisor is substituted for the former, who is thereby discharged.

(3) When a new creditor or promisee is substituted for the former, as to whom the debtor is discharged.

Where A. owed B. a sum of money and C. owed A. a like sum, it was agreed between all parties that C. should give his note to B. for the amount and be substituted in the place of A. as B.'s debtor. C. was insolvent at the time, but this fact was unknown to the other parties. It was held that A.'s liability to B. was extinguished by the novation.⁵

A. owed money to a contractor who was building a house for him, and the contractor owed money to B. for lumber used in its construction. It was agreed that A. should pay the amount he owed to the contractor to B., who accepted A. as his debtor in the place of the contractor. This transaction was held not to be a promise by A. to answer for the debt of another, within the Statute of Frauds, since the liability of the contractor to B. was extinguished.⁶

So where defendant agrees to pay certain bills for labor, but instead of paying them in full deducted, with the consent of all the parties, the amounts due by the laborers to boarding-house keepers, the latter releasing the laborers, the case is one of novation, and the boarding-house keepers may enforce their claims against the defendant.⁷ In like manner, where the purchaser of real estate executed a single bill for the bal-

⁴ "When one of the two parties to a written contract fails in his obligation to deliver merchandise as provided by the contract, and the other party, desiring the merchandise, and not desiring a suit for damages, agrees to accept a fixed quantity and quality of merchandise, at fixed times and prices, different from those of the original contract, the old contract will be deemed to have been cancelled by the parties and the new contract will be held to be based upon sufficient consideration." *Dreifus v. Salvage Co.*, 194 Pa. 475. This was not held to be an accord and satisfaction.

⁵ *Cadens v. Teesdale*, 53 Vt. 460.

⁶ *Griffin v. Cunningham*, 183 Mass. 505.

⁷ *Sterling v. Ryan*, 72 Wis. 36.

ance of the purchase money, which was assigned by the vendor, and subsequently the assignee surrendered the bill to the maker and received a new bill in its stead, it was held that by such transaction a new contract was entered into which extinguished the lien even if it had passed.⁸

But mere postponement of the time of performance is not a discharge of the contract and the substitution of a new one.⁹ A contract under seal may be extended in time by one not under seal, and such extension does not constitute a new contract.¹⁰

In the case of a simple contract in writing, it is competent to prove by parol a distinct subsequent agreement, assented to with the same understanding by both parties, waiving, abandoning, or modifying the terms of the writing.¹¹ If the novation be the introduction of a new party in the contract, it must be with the consent of the other.¹²

A second contract for the performance of the same work contemplated by the first is a waiver thereof, and is presumed to contain the whole agreement.¹³ When a special contract for certain work has been modified by a new agreement, the plaintiff who has performed should sue in *indebitatus assumpsit*, and not on the special contract.¹⁴

Novation may occur when the creditor takes from his debtor a new security in payment of the old debt. But generally the mere giving of a promissory note on account of a pre-existing simple contract debt does not merge or extinguish such debt, and if the note is not paid the creditor may sue on the original contract.¹⁵ An express agreement, however, by the creditor to receive the note of the debtor, or of a

⁸ Hurlock v. Smith, 39 Md. 436.

⁹ Watkins v. Hodges, 6 H. & J. 38; Ins. Co. v. Hamill, 5 Md. 170.

¹⁰ Balto. Ins. Co. v. McGowan, 16 Md. 47.

¹¹ Allen v. Sowerby, 37 Md. 411; Utley v. Donaldson, 94 U. S. 48; Rayner v. Wilson, 43 Md. 440; Teal v. Bilby, 123 U. S. 578.

¹² Nat. Bank v. Hall, 101 U. S. 50.

¹³ Howard v. R. R. Co., 1 Gill. 311; Smith v. Chaney, 4 Md. Ch. 246.

¹⁴ Hannan v. Lee, 1 H. & J. 231; Rodemer v. Hazlehurst, 9 Gill, 288, note.

¹⁵ Patapsco Ins. Co. v. Smith, 6 H. & J. 166, note.

third party, absolutely as payment, and to run the risk of its being paid, is an extinguishment of the previous debt, whether the note be afterwards paid or not.¹⁶ So the substitution of a debtor's obligation of a higher nature for a debt due by him of inferior degree, extinguishes the original liability.¹⁷

§ 176. **Prior Provision for Extinguishment.** Stipulations in a contract providing for its discharge upon the occurrence of specified events, or at the option of one of the parties, are in the nature of conditions subsequent. Thus the ordinary clause of defeasance in a mortgage discharges the contract and conveyance upon payment of the mortgage debt. When an article is sold with the privilege of returning it if not satisfactory, the exercise of the option by the vendee discharges the contract.¹ When a contract for service for a year provides that defendant may dismiss plaintiff at any time during the year on giving one month's notice, and the latter is so dismissed, the contract is not broken, but discharged.² When a contract is rescinded by virtue of a clause therein, money paid under it may be recovered back,³ unless the contract provide for a forfeiture thereof.⁴

§ 177. **Form of Discharge by Agreement.** The common law rule that a contract under seal can only be discharged by an agreement under seal is not now applied. After breach, a sealed contract may be discharged by a parol agreement, and a contract under seal may, before breach, be varied by a subsequent parol agreement.¹

¹⁶ Glenn v. Smith, 2 G. & J. 493, note.

¹⁷ Moale v. Hollins, 11 G. & J. 11; see ante, page 40.

¹ See ante, Part v, ch. 1. Conditional Contracts. Parties may agree as to the future event which shall put an end to the contract. Del. R. Co. v. Bowns, 58 N. Y. 573.

² Jenkins v. Long, 8 Md. 132.

³ Johnson v. Evans, 8 Gill, 155.

⁴ Ante, § 166; Geiger v. Western Md. R. Co., 41 Md. 4.

¹ Canal Co. v. Ray, 101 U. S. 522; Rogers v. Rogers, 139 Mass. 440; Holdsworth v. Tucker, 143 Mass. 309; McCreery v. Day, 119 N. Y. 1.

In an action of covenant on a contract under seal for the performance by plaintiff of certain musical services for defendant, it was pleaded that the contract had been mutually rescinded and abandoned by the parties. It was held, 1. That if the plaintiff advised and consented to the abandonment of the work contemplated by the agreement sued on, and afterwards, but within the time covered by the original agreement, made a new contract with defendant to perform similar work on different terms, such conduct amounted to a waiver or abandonment of the original agreement and was a good defence. 2. That parol evidence of such waiver was admissible.²

²Herzog v. Sawyer, 61 Md. 345

CHAPTER II

✓ DISCHARGE OF CONTRACT BY PERFORMANCE

§ 178. **In General.** Performance is the most natural and usual mode of discharging a contract, and thereby unloosing the *vinculum juris*. Whether what is done is performance depends upon the construction of the contract. If the promisee has received that which he had a right to demand, the contract is discharged.¹ When what is done does not correspond with the promise as originally made, it may have been accepted as full performance by a waiver or novation. It is for the promisee to say whether he will accept that as performance which is not strictly such. The effect of an incomplete or partial performance is discussed in the next chapter.

Since promisee is entitled to demand the exact thing or performance described in the contract, he cannot be compelled to accept the offer of anything else in its stead, although it may be of the same or greater value.² It has been seen however, that in the case of an alternative contract, the promisor is authorized to perform in more than one way.³

All that has been promised, must be delivered or performed at the time stipulated. The promisee cannot be compelled to accept a part performance or a part payment. Thus when a contract calls for the shipment of 536 tons of kainit and only 506 arrive and are tendered, the buyer is authorized to reject the delivery.⁴

There are certain limitations upon the generality of this rule. It will be seen in the next chapter that performance at the exact time mentioned is not always essential, and also that in some contracts a substantial compliance, but not a

¹ *Solvere dicimus cum qui fecit quod facere promisit.* Dig. Lib. 50, Tit. 16, 1, § 176.

² *Aliud pro alio, invito creditori, solvi non potest.* Dig. 12, 1, 2, § 1.

³ *Ante*, Part v, ch. 2.

⁴ *Salmon v. Boykin*, 66 Md. 541.

complete one, merely authorizes the promisee to claim compensation and does not entitle him to rescind the contract.

It is also the rule that the failure to perform a subsidiary or collateral promise has the same effect.⁵

§ 179. **Payment** is performance and discharge when the obligation of the promisor is to pay a sum of money, and the payment is made by him.¹ Whether a certain sum is paid in full satisfaction of the claim or in part payment depends upon the purpose and understanding with which it was made.² A check given *bona fide* on a banker having funds to pay it is *prima facie* payment if accepted as such.³ When no particular time for payment is limited in the contract, it is to be made within a reasonable time.⁴

When a promissory note is given for a pre-existing debt, it is not a payment or extinguishment thereof, unless the creditor agrees to receive it absolutely as payment, but the right of action on the original debt is suspended until the maturity of the note.⁵ Whether the acceptance of a note or other security for an existing debt is payment or not depends upon the intention of the parties.⁶ A note of a third party, or an order on him, discharges the debt, provided it is accepted by the creditor as payment.⁷ And when the note of a third person, endorsed without recourse, is taken in payment of goods, there is no remaining liability on the part of the buyer.⁸ So a promissory note and the debt it represents may be paid by

⁵ See *post*, chapter iv.

¹ *McAleer v. Young*, 40 Md. 440; *Boyd v. Parker*, 43 Md. 202; *Neidig v. Whiteford*, 29 Md. 179.

² *Rohr v. Anderson*, 51 Md. 205.

³ *Woodville v. Reed*, 26 Md. 280. *Cf. League v. Waring*, 85 Pa. 244; *Lineweaver v. Slagle*, 64 Md. 465.

⁴ *Triebert v. Burgess*, 11 Md. 452; *Johnson v. Johnson*, 40 Md. 199.

⁵ *Glenn v. Smith*, 2 G. & J. 493, notes; *Hall v. Richardson*, 16 Md. 396. As to the acceptance of the note of one partner in payment of a firm debt, see *Folk v. Wilson*, 21 Md. 538.

⁶ *Flannigin v. Hambleton*, 54 Md. 230; *Trader v. Löwe*, 45 Md. 1; *Walker v. Stone*, 20 Md. 195.

⁷ *Chapman v. Smoot*, 66 Md. 8; *Susq. Fer. Co. v. White*, 66 Md. 444; *Haines v. Pearce*, 41 Md. 221; *Hoopes v. Strasburger*, 37 Md. 390.

⁸ *Deford v. Dryden*, 46 Md. 248.

the acceptance of a new note when such is the agreement of the parties.⁹

Application of payments. When a person is indebted in different accounts and makes a payment, he has the right to appropriate it to the discharge of one of the debts rather than another. If he does not make an appropriation, the creditor may do so under certain limitations, and if neither party does, the law applies it to the earliest debit.¹⁰ But credits growing out of the contract itself are not like payments of money on account, and do not fall within the rule requiring a payment to be applied to the first items of debt on the account, but should be credited to the indebtedness to which the contract relates.¹¹

Tender. When a party's offer to perform what he contracted to perform is refused by the other party, the party offering is entitled to maintain or defend an action for the breach of the contract.¹² When the defendant has positively refused to proceed with the contract, the plaintiff may sue for a breach or file a bill for specific performance without a tender of performance; he need only allege himself to be ready and willing to perform.¹³

If the contract be for the payment of money, in order to constitute a legal tender the exact and full amount must be actually produced, unless the creditor dispense with its production by express declaration or some equivalent act, as by saying that if produced the money will not be accepted.¹⁴

⁹ *Ecker v. First Nat. Bank*, 59 Md. 291.

¹⁰ *Gwinn v. Whitaker*, 1 H. & J. 754, note; *Albert v. Lindan*, 46 Md. 334; *Harris v. Hooper*, 50 Md. 537; *Hammett v. Dudley*, 62 Md. 154; *Dickey v. Land Co.*, 63 Md. 170; *Leeds v. Gifford*, 41 N. J. Eq. 464.

¹¹ *Suter v. Ives*, 47 Md. 520.

¹² *Oelrich v. Artz*, 21 Md. 524.

¹³ *Oakley v. Cook*, 41 N. J. Eq. 350; *Eckenrode v. Chem. Co.*, 55 Md. 51.

¹⁴ *Shannon v. Howard As'n*, 36 Md. 392; *Dungan v. Mutual Benefit Co.*, 46 Md. 469; *Fridge v. State*, 3 G. & J. 104. *Cf. Bissell v. Heyward*, 96 U. S. 587. It has been said that since the tender must be absolute and of the exact amount due, with interest, the debtor cannot demand a receipt as a condition of making the payment. *Richardson v. Jackson*, 8 M. & W. 298. But this is an unreasonable rule and is contrary to ordinary usage.

When a tender is made and refused, interest on the debt ceases to run from the time of the tender, and the debtor is released from the payment of costs, if no greater sum is recovered by the creditor, provided the tender is kept good.¹⁵ The debtor cannot afterwards deny that the amount tendered was due, and its rejection does not of course discharge the debt.¹⁶

¹⁵ *Kinnaird v. Trollope*, 42 Ch. D. 610; *Columbian As'n v. Crump*, 42 Md. 192. When suit is brought the money should be paid into Court.

¹⁶ *McCullough v. Hellweg*, 66 Md. 276. A plea of tender not accompanied by a *profert in curia* is bad. *Karthauss v. Owings*, 6 H. & J. 134; *Soper v. Jones*, 56 Md. 511.

CHAPTER III.

TIME AND MODE OF PERFORMANCE

§ 180. When Performance at Time Stipulated Essential.

Time may be made of the essence of the contract by the express stipulation of the parties, or it may be construed to be of the essence from a consideration of the nature of the transaction.¹ In mercantile contracts, stipulations as to the time when an act shall be performed are generally of the essence.² So where a charter party provided that the lay days of the vessel for receiving cargo should commence not before January 1st and not later than January 31st, and the vessel was tendered one day too late, it was held that the charterers were justified in refusing to accept her.³ Under a contract for the manufacture of goods and their delivery on a specified day, time is of the essence and the vendee is not bound to accept them unless they are delivered or tendered on that day.⁴

In *Bowes v. Shand*,⁵ two contracts were made, each for the sale of 300 tons of Madras rice (filling 8,200 bags), "to be shipped at Madras during the months of March or April, per Rajah." Of this quantity, 7,120 bags were put on board and the bills of lading signed in February, and for 1,030 bags, put on board in February, and 50 in March, the bills of lading were signed in March. The buyer refused to accept the cargo because all the rice was not shipped in the months

¹ *Cheney v. Libbey*, 134 U. S. 77.

² *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 263; *Norrington v. Wright*, 115 U. S. 188. See also, as to when time is of the essence. *Scarlett v. Stein*, 40 Md. 152; *Abbott v. Gatch*, 13 Md. 314; *Watchman v. Crook*, 5 G. & J. 239; *Higgins v. Del. L. & W. R. Co.*, 60 N. Y. 553.

³ *Barker v. Borzone*, 48 Md. 474.

⁴ *Jones v. U. S.*, 96 U. S. 24.

⁵ 2 Appeal Cas. 455, reversing the decision of the Court of Appeals in 2 Q. B. D. 112, and affirming the decision in 1 Q. B. D. 470. *Bowes v. Shand*, is approved in *Salmon v. Boykin*, 66 Md. 548, and *Norrington v. Wright*, 115 U. S. 207.

designated in the contract, and in an action against him, evidence was given that the rice shipped in February was of the spring crop and as good as rice shipped in March. In holding that the seller could not recover, because the contract required all the rice to be put on board in March or April, Lord Chancellor Cairns said:

“It does not appear to me to be a question for your Lordships, or for any Court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance * * *. If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace, that literal meaning, to say that it puts an additional burden on the seller without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfilment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped, but that is no reason why a term which is found in a contract should not be fulfilled. * * * It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My Lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have

said, that it bears, that the rice is to be put on board in the month in question, that is part of the description of the subject-matter, of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months. * * * The plaintiff who sues upon that contract has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfilment of the contract."

Time is not generally of the essence of a contract to convey land, but may be made so by agreement, or may be construed to be so from the nature of the transaction.⁶ But time for perfecting title to land will not be extended beyond the agreed period.⁷

Waiver. Provisions in a contract as to time may be waived by the promisee.⁸ If one party prevents performance by the other within the stipulated time, the latter will be allowed to perform subsequently.⁹ Where, after making a contract to do certain work by a certain time, the other party directs alterations to be made, such an extension of time as is necessitated by the change will be implied.¹⁰

When a party to a contract promises to do a certain thing at or before a specified time, but does it after the expiration of that time, he is entitled to recover the value of his work, if accepted by the other party, less such damages as have been caused by the delay.¹¹

In Equity time is not generally deemed to be of the essence of the contract, "unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances

⁶ *Derrett v. Bowman*, 61 Md. 526; *Brown v. Guarantee Trust Co.*, 128 U. S. 414; *Waterman v. Banks*, 144 U. S. 395; *Diamond v. Shriver*, 114 Md. 643.

⁷ *Gilman v. Smith*, 71 Md. 171. Time is not of the essence of a contract to pave a street. *Mayor of Balto. v. Raymo*, 68 Md. 569.

⁸ *Pinckney v. Dambmann*, 72 Md. 173; *Phillips, etc., Co. v. Seymour*, 91 U. S. 651; *Mix v. Baldus*, 78 Ill. 215.

⁹ *Rees v. Logsdon*, 68 Md. 93.

¹⁰ *Manufac. Co. v. U. S.*, 17 Wall. 592.

¹¹ *Orem v. Keelty*, 85 Md. 337.

of the contract.”¹² And even when an express stipulation has made time of the essence, equity will in some case permit a subsequent performance to have effect,¹³ or order compensation to be made for the delay.¹⁴

§ 181. **Performance After Death of Promisor.** A contract providing that it shall not go into effect and be performed till after the death of the promisor is valid. The obligation is created in the promisor's lifetime, but its execution is postponed. Thus a promise by A. that his executor will pay a sum of money to B. is enforceable against A.'s estate after his death.¹

An instrument in the following form: “To my executor or administrator—Pay to the order of F. S. \$600, it being for work in home and for manual labor on my farm E. J. seal” shows an existing indebtedness, the time for payment of which is deferred until after the death of the obligor, and such instrument is not in the nature of a testamentary disposition.²

A provision in articles of partnership that “in the event of the death of the senior member of the firm all his property * * * which he held in partnership at the time of his death” should go to the junior partner, is valid as a contract and not as a will.³

A promise by one sister to another that if the latter will reside with her, she will “give and bequeath” to her all the property of which she dies possessed, is enforceable as a contract.⁴

¹² *Coleman v. Applegarth*, 68 Md. 21; *Maughlin v. Perry*, 35 Md. 359; *Taylor v. Longworth*, 14 Pet. 172. As to why the rule in equity differs from the rule at law, see *Langdell Summary*, § 159.

¹³ *Cheney v. Libby*, 134 U. S. 77.

¹⁴ *Wilson v. Herbert*, 76 Md. 489.

¹ *Krell v. Codman*, 154 Mass. 454; 14 L. R. A. 860; *Feeser v. Feeser*, 93 Md. 716. See also, *Fitzsimmons v. Lindsay*, 205 Pa. 79; *Fitzgerald v. English*, 73 Minn. 266.

² *Junkins v. Sullivan*, 110 Md. 539.

³ *McKinnon v. McKinnon*, 56 Fed. Rep. 409.

⁴ *Emery v. Darling*, 50 Ohio St. 160. See also, *Howe v. Watson*, 179 Mass. 30; *Semmes v. Worthington*, 38 Md. 298.

§ 182. **Incomplete Performance of Entire Contracts.** When the contract is entire, the general rule is that the plaintiff cannot recover in an action unless he proves that the contract has been fully performed on his part, or that it was waived or modified by mutual consent, or that its fulfilment was prevented by the defendant.¹ In such cases full performance of his promise by the party who sues on the contract is generally spoken of as a condition precedent to his right to recover. The defendant has agreed to be liable only when certain things shall have been done by the plaintiff, and the law will not, as a rule, change the terms of his liability. There are, however, some cases in which the plaintiff's incomplete performance affects only a subordinate part of his undertaking. The rights of the parties when this is the case are discussed subsequently under the head of subsidiary promises.

There are also cases, which frequently occur, where one party has not fully performed his promises but he has nevertheless conferred a benefit upon the other party. The question then is, what does good faith, according to the true nature of the contract, require? The rights and liabilities of the parties in this event depend upon a variety of considerations, and can be best discovered by considering the effect of an incomplete performance in a few particular kinds of contracts.

§ 183. **Building Contracts.** The instances to be considered are where a party has agreed to erect or repair a building, according to certain plans, or to be finished within a

¹ *Galvin v. Prentice*, 45 N. Y. 16; *More v. Luther*, 153 Mich. 206; 18 L. R. A. (N. S.) 149; *Denmead v. Coburn*, 15 Md. 29; *Coates v. Sangston*, 5 Md. 21; *Watkins v. Hodges*, 6 H. & J. 38. A party who wilfully abandons a contract after executing a part of it cannot recover the value of the part performance. *Johnson v. Fehsefeldt* 106 Minn. 202; 20 L. R. A. (N. S.) 1070. If the contract for the hire of labor in connection with a thing be entire, the compensation being payable after the completion of the work, then if the failure to perform all the services is the fault of the party who agreed to perform, there can be no recovery for a part performance. *American Towing Co v. Baker-Whitely Co.*, 111 Md. 504.

certain time, or to do similar work, and fails in some particular, great or small, to render exact performance.

(1) The employer may accept the building or work, although the contract was not performed, or he may, by a waiver, have acquiesced in the deviations, and in such case he is liable on a *quantum meruit* for the value of the work done.¹ But mere occupation of such a building is not an acceptance and waiver.²

(2) The building as completed may vary in unimportant particulars from the specifications, leaving the contract substantially performed. In such case, the builder, if he has acted in good faith, and has unintentionally or inadvertently failed in some particulars to perform the contract, may yet recover for his services, deducting from the contract price so much as the building is worth less than the one contracted for, or, according to some cases, deducting from the contract price so much as it would require to make the building conform to the contract.³

¹ *United Surety Co. v. Summers*, 110 Md. 95; *Iron Clad Mfg. Co. v. Stanfield*, 112 Md. 361; *Watchman v. Crook*, 5 G. & J. 240; *Dermott v. Jones*, 23 How. 233; *Orem v. Keelty*, 85 Md. 337. As to when acceptance of defective work or goods is a waiver of the right of damages, see *Watson v. Bigelow Co.*, 77 Conn. 129.

² *Pres. Church v. Hoopes Co.*, 66 Md. 598; *Miller v. Phillips*, 31 Pa. St. 218; *Smith v. Brady*, 17 N. Y. 173; *Elliott v. Caldwell*, 43 Minn. 357, 360; *Feeney v. Bardsley*, 66 N. J. L. 239; *Gillis v. Cohe*, 177 Mass. 584; *Payne v. Amos Brick Co.*, 110 La. 750; *Industrial Works v. Mitchell*, 114 Mich. 29. The temporary use of a defective furnace by a house owner is not an acceptance of it. 101 Wis. 337. See also, *Manitowoe Works v. Glue Co.*, 120 Wis. 1. One whose land has been ploughed by another does not accept it as a service merely because he raises a crop on it. *Smith v. Brady*, 17 N. Y. 188.

³ *Dermott v. Jones*, 2 Wall. 1; *Pepper v. Phila.*, 114 Pa. St. 96; *Sticker v. Overpeck*, 127 Pa. St. 446; *Glacius v. Black*, 50 N. Y. 143; *Gleason v. Smith*, 9 Cush. 484; *Moulton v. McOwen*, 103 Mass. 591; *Cullen v. Sears*, 112 Mass. 308; *Leeds v. Little*, 42 Minn. 414; *Beha v. Ottenberg*, 6 Mackey (D. C.), 348. In *Iron Clad Mfg. Co. v. Stanfield*, 112 Md. 361, it was held that in case of substantial but not exact performance there should be deducted from the contract price the difference between the value of the building as erected and the value of the building specified, and the contractor is entitled to recover the contract price less that sum. Appended to the case of *Foeller v. Heintz*, 24 L. R. A. (N. S.) 327, is a note collecting cases upon the

Whether there has been substantial performance or not, is a question of fact.⁴ In one case, plaintiff's contract was to furnish certain machinery and put it into complete running order in defendant's mill. The machinery did not work satisfactorily and plaintiff was notified "to put the mill in repair so as to do good work," but he did not do so. In an action to recover the contract price, it was held that the defendant was not bound to remove the machinery in order to avoid paying the whole price, but he was entitled right of recovery when a building contract has been substantially but not completely performed; as to what constitutes a substantial performance, and as to the measure of recovery.

⁴ *Phillips v. Gallant*, 62 N. Y. 256. See generally as to the effects of part performance. *White v. School District*, 159 Pa. 201; *Hartman v. Meehan*, 171 Pa. 46; *Bozarth v. Dudley*, 44 N. J. L. 304; *Desmond Co. v. Freedman Co.*, 162 N. Y. 486; *Smith v. Packard*, 94 Va. 730; *Cien v. Birchard*, 124 Iowa, 374; *Uldrickson v. Saindahl*, 92 Minn. 297; *Shepard v. Mills*, 173 Ill. 223; *Palmer v. Meriden*, 188 Ill. 508; *Evans v. Howell*, 211 Ill. 85; *Burke v. Coye*, 188 Mass. 401; *Waterman v. Banks*, 144 Mass. 394; *Kelsey v. Crowther*, 162 U. S. 404. In *Bowen v. Kimbell*, 203 Mass. 364, the Court said: "Formerly it was generally held that a contractor could not recover unless there was a complete performance of the building contract or a waiver as to the part not performed, and that he could not recover on a quantum meruit, after a partial performance from which the owner had received a benefit unless there had been such subsequent dealings as would create an implied contract to pay. *Smith v. Brady*, 17 N. Y. 173; *Sumpter v. Hedges* [1898], 1 Q. B. 673. But in most of the American States, a more liberal doctrine has been established in favor of contractors for the erection of buildings, and it is generally held that if a contractor has attempted in good faith to perform his contract and has substantially performed it, although by inadvertence he has failed to perform literally, he may recover under the contract with a proper reduction to the owner for the imperfections or omissions. *Woodward v. Fuller*, 80 N. Y. 312; *Oberlies v. Ballinger*, 132 N. Y. 598, etc. It would seem that in cases of this kind where the plaintiff recovers under the contract the contract price less the deduction he ought to aver not absolute but only substantial performance and a right to recover only the balance after allowing the owner a proper sum for the failure. *Spence v. Ham*, 163 N. Y. 220. The rule very generally adopted is that to entitle the plaintiff to recover he needs only show that he proceeded in good faith, and the result was a substantial performance." In this case, the plaintiff was guilty of an intentional departure of the contract in a substantial matter because in plastering he had used less than half the quantity of adamant called for by the specifications.

to deduct in this action from the contract price the reasonable cost of altering the machinery so as to make it conform to the contract.⁵

(3) The building as completed may vary in substantial and important particulars from the contract and the variations may not have been acquiesced in by the employer. If in such case the structure is on the land of the builder, the other party may of course refuse to accept it; but if the structure, etc., is on the land of the employer, there is a conflict of opinion as to whether the builder is entitled to recover anything or not, for such incomplete performance.

The doctrine of some cases is that where the builder has departed from the contract in material particulars, he can recover nothing for what he has done, although the employer chooses to use the building rather than remove it from his premises, and although it may be of some value to him.⁶ It is said in some of these cases that the mere occupation of a building by the owner does not amount to a waiver of the terms of the contract, and that there is no hardship in requiring builders, like all other men, to perform their contracts in order to be entitled to payment, when the employer has agreed to pay only on that condition.

But other cases hold that in this case the employer is liable to the extent of the benefit received, or that the damages for the breach are to be recouped from the contract price, because upon a rescission the parties cannot be placed *in statu quo*.⁷ In one case where there were important variations from the contract specifications, which, however, were caused by inadvertence, and the defendant used the house, it was held that since it would be impossible to make the structure conform to the contract without partially taking it

⁵ Stillwell Mfg. Co. v. Phelps, 130 U. S. 520.

⁶ Miller v. Phillips, 31 Pa. St. 218; Smith v. Brady, 17 N. Y. 173; Woodward v. Fuller, 80 N. Y. 315; Bozarth v. Dudley, 15 Vroom, 304; Elliott v. Caldwell, 43 Minn. 357; Munro v. Butt, 8 El. & B. 738; Sumpter v. Hedges [1898], 1 Q. & B. 673. See cases *ante* in note 4.

⁷ Hayward v. Leonard, 7 Pick. 181; Norris v. School District, 12 Me. 293; Wadleigh v. Town of Sutton, 6 N. H. 15; Gilman v. Hall, 11 Vt. 510; Adams v. Crossley, 48 Ind. 155.

down, which would deprive the builder of any compensation, the defendant was only entitled to deduct from the contract price the amount of the diminution in value caused by the deviations.⁸

The obvious objection to the holding of the second class of cases is that it compels a man to pay for a building materially different from the one for which he contracted, and that it gives to a builder an arbitrary power to make the owner of land liable, to some extent at least, for any kind of structure the former may choose to erect. It would seem that the prior rule above stated, namely, that unimportant deviations from the contract do not prevent a recovery, affords ample protection to a builder who acts in good faith and with due diligence. In a case where this question arose the Court said:⁹ "The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, or unimportant omissions or defects. It is incumbent on him who invokes its protection to present a case in which there has been no wilful omission or departure from the terms of his contract. If he fails to do so, the question of substantial performance should not be submitted to the jury."

(4) If the builder wilfully and without legal excuse abandons the work after a part performance he can recover nothing for what he has done.¹⁰ Unless indeed the part that he has failed to perform is so slight that it may be overlooked on

⁸ *Pinches v. Swedish, etc., Church*, 55 Conn. 183. But in *Martus v. Houck*, 31 Mich. 439, it was held that if the employer should use the house, the measure of recoupment would be what it would cost to make it conform to the specifications, and not the difference in value between the building as it is and as it would be if completed according to the contract.

⁹ *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19, 26. See also, *Schultze v. Goodstein*, 180 N. Y. 248.

¹⁰ *Gill v. Vogler*, 52 Md. 666; *Pullen v. Green*, 75 N. C. 215; *Scheible v. Klein*, 89 Mich. 376; *Johnson v. Fehsefeldt*, 106 Minn. 202; 20 L. R. A. (N. S.) 1070.

the principle *de minimis non curat lex*.¹¹ But if the employer should refuse to pay an instalment when due, the builder would have a legal excuse for suspending the work.

If the failure to complete is not wilful, the builder is entitled to recover for the value of his work, less the damages suffered.¹²

(5) If the house is destroyed by fire, or blown down, or otherwise damaged, before it is finished, the performance of the contract is not excused by such accident.¹³ And not only can the builder recover nothing for the part performance, but he remains liable on his contract to erect the house.¹⁴ So where one is to be paid for cutting timber, making it into lumber and delivering to the defendant, he can recover nothing on a *quantum meruit*, where the lumber is destroyed by fire before completion of the work.¹⁵ But if the work as done had been accepted by the owner, or its completion prevented by him, then the workman may recover the *pro rata* value of what he performed.¹⁶

Some cases adopt a different rule when the contract is to do part of the work on a house, or to erect fixtures or make repairs in it. These cases, proceeding upon the theory that the owner, having the control and custody of the house, is bound to keep it in readiness to receive the work, hold that if the house is destroyed by fire after part performance, the owner is liable to pay for the same, although under the contract the workman was to be paid only on the completion

¹¹ Van Clief v. Van Vechten, 130 N. Y. 579.

¹² Davis v. Ford, 81 Md. 333. In Hillyard v. Crabtree, 11 Texas, 264, it was held that where one has contracted to do an entire thing, as to build a house for a lump sum, and is disabled by illness from completion after doing a part, he is entitled to recover for the part performed, if beneficial, after deducting damages for the breach. But see Cutter v. Powell, 2 Smith's Leading Cases and notes.

¹³ Milske v. Steiner Mantel Co., 103 Md. 235, and cases in note 15 and in next chapter.

¹⁴ Supt. of Public Schools v. Bennett, 3 Dutcher, 513; Newmon v. Lumber Co. Purdum, 41 Ohio St. 373; Lawing v. Rintles, 97 N. C. 350; Dermott v. Jones, 2 Wall. 1.

¹⁵ McDonald v. Bryant, 73 Wis. 20. See Eichelberger v. Miller, 20 Md. 332.

¹⁶ Galyon v. Ketchen, 85 Tenn. 55.

of the work.¹⁷ The same principle has been applied where the contract was to do work on chattels in defendant's possession, which are destroyed before completion, the workman being allowed in such case to recover on a *quantum meruit*.¹⁸

(6) If the builder, after doing part of the work, is prevented by the employer from completing it, he is entitled to recover the value of what he performed and damages for the breach of the contract.¹⁹ The employer is not bound to permit the work to be completed but may countermand his directions.²⁰

(7) If the building is not completed within the time limited by the contract, the employer is entitled to recoup the damages suffered by him in consequence of the delay, which are measured by the rental value of the property.²¹ And if the contract provides that the builder shall pay a certain sum per week, etc., for delay in completion, such sum may be recovered as liquidated damages.²²

(8) *Extra Work*. If extra work is required by a change in the plans, or is done at the request of the owner, the other party is entitled to additional compensation.²³ But if the original contract provides that no extra charge shall be made unless under a written agreement, such clause protects the owner from extra charges, unless he waived the provision

¹⁷ *Cook v. McCabe*, 53 Wis. 250; *Butterfield v. Bryan*, 153 Mass. 517; *Haynes v. Second, etc., Church*, 88 Mo. 285; *Weiss v. Devlin*, 67 Tex. 507. *Cf.* *Eichelberger v. Miller*, 20 Md. 332. *Contra*, *Appleby v. Myers*, L. R. 2, C. P. 651; *Brunby v. Smith*, 3 Ala. 123; *Filden v. Besley*, 42 Mich. 100.

¹⁸ *Whelan v. Ansonia Clock Co.*, 97 N. Y. 293; *Cleary v. Shoier*, 120 Mass. 210.

¹⁹ *Black v. Woodrow*, 38 Md. 216; *Lockport v. Shields*, 87 Ill. 150; *District of Columbia v. Camden Iron Works*, 181 U. S. 453.

²⁰ See *post*, chap. 5.

²¹ *Abbott v. Gatch*, 13 Md. 314; *Vanderbilt v. Iron Works*, 25 Wend. 665. But see *Slater v. Emerson*, 19 How. 224; *Munroe v. Butt*, 8 El. & Bl. 738. And *cf.* *Van Buren v. Digges*, 11 How. 461; *Dermott v. Jones*, 23 How. 220; *Phillips, etc., Co. v. Seymour*, 91 U. S. 651; *Filston Farm Co. v. Henderson*, 106 Md. 335.

²² See *ante*, § 105; *post*, chap. 5.

²³ *Stewart v. Am. Bridge Co.*, 108 Md. 200; *Harrison v. McLaughlin Bros.*, 108 Md. 427.; *Orange, etc., R. R. Co. v. Placide*, 35 Md. 315.

and directed the additional work to be done.²⁴ When the employer has promised to pay for the extra work, and the written order as required by the contract was not received by reason of inadvertence, the builder may recover for the same.²⁵

§ 184. **Contracts of Service.** When the contract of hiring is for a definite period it may remain incomplete by a discharge of the servant, either rightfully or wrongfully, before the expiration of the term of service, or by an abandonment of the work by the servant, either wilful or for good reason.

When the servant leaves the employment, without excuse, before the end of his term of service, it is generally held that he can recover nothing for the partial rendition of the promised services, because of the entirety of the contract.¹ If, however, the completion of the service is prevented by the servant's illness or death, he, or his administrator, is entitled to recover for the part performance.²

²⁴ Phoenix Ins. Co. v. Grove, 215 Ill. 302; Stubbings Co. v. Walds Ex. Co., 110 Ill. App. 210. To the contrary are Abbott v. Gatch, 13 Md. 314; Balto. Cemetery Co. v. Coburn, 7 Md. 202. These two cases were examined and dissented from in Badders v. Davis, 88 Ala. 375, where it was held that the parties may at pleasure alter, modify, or rescind a contract, by mutual consent given orally, unless the contract is required by law to be in writing. In Bishop v. Agric. Ins. Co., 130 N. Y. 496, it was held that a party to a contract containing a stipulation that it shall not be modified or changed, except by a writing signed by him, may by conduct estop himself from enforcing the provisions against a party who has acted in reliance upon the conduct.

²⁵ O'Brien v. Fowler, 67 Md. 561. As to when the production of a certificate of the architect is a condition of the builder's right to recover the contract price, see *ante*, § 138.

¹ Miller v. Goddard, 34 Me. 102; Olmstead v. Beale, 19 Mass. 527; Thrift v. Payne, 71 Ill. 409. But see *contra*, that there may be a recovery on a *quantum meruit*, Britton v. Turner, 6 N. H. 481; McClay v. Hedge, 18 Iowa, 66. Cf. Steepley v. Newton, 7 Or. 110.

² Wolfe v. Howes, 20 N. Y. 197; Clark v. Gilbert, 26 N. Y. 279; Fuller v. Brown, 11 Met. 440. The case of Cutter v. Powell, 2 Smith's Lead. Cas. is not followed in America on this point, unless the contract in that case is to be regarded as in the nature of a wager.

If the servant or employee is rightfully discharged, he may nevertheless recover his proportionate wages to date, or compensation on a *quantum meruit*.³ What is a rightful discharge depends upon the facts of the case. An employee may be rightfully discharged for incompetency⁴; or if he does any act which may injure the business of the employer.⁵ The question of rightful discharge depends also upon the term of hiring. When the contract is indefinite, no time being specified, it is generally construed as a hiring at will, although wages may be paid monthly.⁶ But on the other hand a stipulation for the payment of wages quarterly, monthly, or even weekly, is not inconsistent with a yearly hiring.⁷ When the contract is made in the first instance for a year, or other definite period, and the service continues afterwards, the presumption is that the same contract prevails for the next year or other period.⁸

If the master wrongfully discharges the servant, the latter is entitled to recover the stipulated salary for the specified period, less such sum as it is shown that the servant did earn, or could, by the exercise of due diligence, have earned

³ *Mallonee v. Duff*, 72 Md. 287; *Lawrence v. Gullifer*, 38 Me. 522. *Contra*, *Beach v. Mullin*, 34 N. J. L. 343; *Lilley v. Elwin*, 11 Q. B. 742.

⁴ *Keedy v. Long*, 71 Md. 385.

⁵ *Adams Ex. Co. v. Trego*, 35 Md. 37. If the servant is arrested and kept in jail, although without his fault, the employer may rescind the contract. *Leopold v. Solkey*, 89 Ill. 412. In an action by a baseball player who was discharged before the expiration of the definite period for which he was employed, no evidence is admissible of a usage among professional baseball clubs that a manager may discharge a player upon ten days' notice, if his playing is not satisfactory to the manager. Such usage is in conflict with the terms of the contract. *Baltimore Baseball Club v. Pickett*, 78 Md. 375. When there is no provision in the contract as to the degree of skill that may be required of such baseball player, he cannot be discharged before the expiration of his term of service on the ground of inefficiency unless he failed to exercise that degree of skill exercised by other professional baseball players of ordinary skill. *Ibid*.

⁶ *Babcock, etc., Co. v. Moore*, 62 Md. 161; *McCullough Iron Co. v. Carpenter*, 67 Md. 554.

⁷ *Norton v. Cowell*, 65 Md. 359.

⁸ *McCullough Iron Co. v. Carpenter*, 67 Md. 554; *Lister's Works v. Pender*, 74 Md. 15.

in some other employment of the same general kind, since his dismissal.⁹ The duty of a servant discharged before the expiration of his term of service is not to remain idle, but to seek other employment.¹⁰ But the burden of showing that the servant did earn wages in another employment after his dismissal, or could have earned them, is on the master in an action against him.¹¹

A servant wrongfully discharged has the following remedies, but only one of them can as a general rule be adopted, and his pursuit of one forbids his subsequent resort to another, upon the principle that for the breach of an entire contract only one action lies.

(a) He may treat the contract as continuing and sue for damages, recovering the wages already earned, and the damages sustained by the breach of the contract.¹²

When a servant employed for one year with wages payable weekly, is wrongfully discharged his wages being paid up to the date of discharge, he has a right to sue but once for such breach of the contract by his employer, and in that action he should claim all the damages to which he is entitled. If after such wrongful discharge, the servant sues for and receives one week's wages for services not rendered, he cannot afterwards bring another action for breach of the contract.¹³

If a servant is wrongfully discharged before the expiration of the period for which he was hired, he is not authorized to allege his readiness to perform the service and sue for the recurring instalments of wages upon the theory of constructive service.¹⁴

⁹ *Jaffray v. King*, 34 Md. 217; *Cumb. & P. R. R. v. Slack*, 45 Md. 161; *Hamill v. Foute*, 51 Md. 419; *Keedy v. Long*, 71 Md. 385.

¹⁰ Cases in last note.

¹¹ *Howard v. Daly*, 61 N. Y. 362; *King v. Steiren*, 44 Pa. St. 99.

¹² *Dugan v. Anderson*, 36 Md. 584; *Balto. Baseball Club v. Pickett*, 78 Md. 375.

¹³ *Olmstead v. Bach*, 78 Md. 132; *Hamilton v. Love*, 152 Ind. 643.

¹⁴ *Howard v. Daly*, 61 N. Y. 362; *Jones v. Dunton*, 7 Ill. App. 580; *Olmstead v. Bach*, 78 Md. 132.

(b) He may elect to treat the contract as rescinded and sue on a *quantum meruit* for the value of his work.¹⁵

(c) He may wait until all the wages mature under the contract and sue to recover the same. But in this case he recovers only the stipulated salary, less such sum as he earned or could have earned in another similar employment.¹⁶

If the contract is made for service to begin at a future period, and when the time arrives the employer refuses to accept the proffered services, the contract is broken and the servant is entitled to recover damages and not wages.¹⁷

§ 185. **Contracts of Sale.** When the contract is for the sale of goods, and the seller delivers only a part of those contracted for, the buyer may rescind the contract by returning the part so delivered, because a seller has no right to compel the buyer to accept a less quantity than that called for by the contract, or to select part out of a larger quantity.¹ But the buyer may retain the part delivered, and in that case the seller is entitled to recover its value, less such damages as the buyer has sustained by the non-delivery of the balance.²

When the contract is for the sale of land, if the vendor is unable to convey all that he contracted to sell, and the deficiency is not material, he is nevertheless entitled to

¹⁵ Keedy v. Long, 71 Md. 385; Hamblin v. Race, 78 Ill. 422.

¹⁶ Keedy v. Long, 71 Md. 385; Liddell v. Chidester, 84 Ala. 508.

¹⁷ Howard v. Daly, 61 N. Y. 362.

¹ Salmon v. Boykin, 66 Md. 541. Sale of Goods Act, art. 30.

² Canton Lumber Co. v. Liller, 107 Md. 146; Oxendale v. Wetherall, 9 B. & C. 386; Wolf v. Gerr, 43 Iowa, 339; Leonard v. Dyer, 26 Conn. 72; Haines v. Tucker, 50 N. H. 207. But in Champlin v. Rowley, 18 Wend. 187, it was held that there could be no recovery for the part delivered, when they were accepted by the buyer without knowledge that the balance would not be delivered. As to the effect in the law of sales of the delivery and acceptance of imperfect articles, or when a warranty is broken, see Brown v. Foster, 108 N. Y. 387; Graham v. Hatch Co., 186 Mass. 226; Watson v. Bigelow Co., 77 Conn. 129; Farren v. Dameron, 99 Md. 32; Columbian Iron Works v. Douglass, 84 Md. 44.

demand specific performance upon making a proportionate abatement from the contract price.³

It has been held in several cases relating to the sale of land, that a vendee who pays part of the purchase money, and then neglects, or for any reason fails, to pay the balance, cannot recover the amount so paid although the owner of the land may have subsequently sold it for the same or a greater price.⁴

And some cases lay down the rule in the broadest terms that money paid on an executory contract which a party has either refused or neglected to perform cannot be recovered back.⁵ This is undoubtedly the proper rule when a buyer has wilfully refused to perform his contract of purchase, and in that case any payments on account of the price that he may have made are forfeited. But suppose the buyer is unable to complete the contract on account of poverty, or illness, or from any cause not amounting to a wilful refusal, and yet has paid to the seller a larger sum than the damages actually suffered by the latter on account of the breach,—in that case can the difference between the amount paid and the damages suffered be recovered? It is true that the language of the courts in the cases last cited would deny the right of recovery even in this event, but the analogy of the cases previously referred to in this chapter concerning the incomplete performance of contracts for service, or for the erection of buildings, might suggest the conclusion that a recovery ought to be allowed.

³ *Foley v. Crow*, 37 Md. 51; *Carmody v. Brooks*, 40 Md. 240; *Mendenhall v. Steckel*, 47 Md. 453. The qualifying words "more or less" cover a small deficiency and then no abatement is made. *Balto. Perm. Society v. Smith*, 54 Md. 187; *Jones v. Plater*, 2 Gill, 125, note.

⁴ *Davis v. Hall*, 52 Md. 673; *Ketchum v. Evertson*, 13 Johnson (N. Y.) 359; *Baston v. Clifford*, 68 Ill. 67. See *ante*, § 166. If the vendor is in default, or is unable to convey a good title, then the amount so paid may be recovered. *Davis v. Hall*, *supra*; *Bernei v. Baltimore*, 56 Md. 360; *Wheeler v. Mather*, 56 Ill. 241.

⁵ *Dula v. Cowles*, 7 Jones L. (N. C.) 290; *Lawrence v. Miller*, 86 N. Y. 139; *Havens v. Patterson*, 43 N. Y. 218; *Clarke v. Rochester*, 28 N. Y. 627; *Packer v. Button*, 35 Vt. 19. But *cf.* *Tipton v. Fietner*, 20 N. Y. 428.

§ 186. **Subsidiary Promises.** The rules laid down in the previous part of this chapter show that where one party has failed to fulfil his agreement in some substantial particular, the other party is authorized to consider himself discharged by such breach and to rescind the contract. But if one means to rescind for this reason he should give the other party clear notice of his intention, unless the circumstances of the case dispense with it.¹ And except in the case of contracts for building, services, etc., he must return or offer to return what he received under the contract.²

It is not every breach of contract, or failure exactly to perform, which justifies a rescission. If the promise which is broken is subsidiary, that is, one which does not go to the root of the matter, defeating the object of the contract, and where the breach can well be compensated by damages, the other party cannot rescind for this reason.³

Thus in a contract for the employment of an opera singer during a season, the partial breach by him of a stipulation that he should be on hand a certain number of days before the season begins, for the purpose of rehearsals, does not justify the employer in rescinding the contract.⁴ The court said: "The question is not whether the plaintiff has any excuse for failing to fulfil this part of his contract, which may prevent his being liable in damages for not doing so, but whether his failure to do so justified the defendant in refusing to proceed with the engagement, and fulfil his, the defendant's, part. And the answer to that question depends on whether this part of the contract is a condition precedent to the defendant's liability, or only an independent agreement, a breach of which will not justify a repudiation of the con-

¹ *Henessey v. Bacon*, 137 U. S. 84.

² *Copley Iron Co. v. Pope*, 108 N. Y. 232.

³ *Tipton v. Feitner*, 20 N. Y. 425; *Worthington v. Given*, 119 Ala. 54; *Wright v. Haskell*, 45 Me. 492; *Haynes v. Hayward*, 41 Me. 488; *Mill Dam Foundry v. Hovey*, 21 Pick. 417; *Wiley v. Athol*, 150 Mass. 426; *Parker v. Middlesex Co.*, 179 Mass. 531; *Neill v. Whitworth*, L. R. 1, C. P. 684. See *Bome v. Eyre*, cited at length, *ante*, p. 164.

⁴ *Bettini v. Gye*, 1 Q. B. D. 183. See also, *Luce v. New Orange Assn.*, 68 N. J. L. 34.

tract, but will only be a cause of action for compensation in damages."

In another case, an opera singer, after having attended the rehearsals, was too ill to appear on the opening night of her engagement, and did not offer her services until a week later. It was held that such inability was a breach going to the root of the consideration and that the manager was justified in rescinding the contract by which the singer was engaged for the season and in engaging another performer.⁵ The court said: "The analogy is complete between this case and that of a charter party in the ordinary terms, where the ship is to proceed in ballast (the act of God, etc., excepted) to a port and there load a cargo. If the delay is occasioned by excepted perils the shipowner is excused. But if it so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo."⁶

A. agreed to saw a certain quantity of logs for B. and also agreed not to saw logs for other persons without B.'s consent. After part performance A. began to saw logs for others without B.'s consent, but his doing so did not prevent him from sawing all the logs delivered by A. It was held that this breach of the contract did not entitle B. to rescind the whole agreement and refuse to make further deliveries, since it was the breach of an independent or subsidiary stipulation.⁷

A further illustration of a subsidiary promise is found in a case where the contract for the sale of a farm provided that the vendor should build a barn and deliver possession by a given day, and it was held that the failure to complete the barn at the given time did not justify a rescission.⁸

When time is not of the essence of the contract, as, for example, in a charter party providing that the vessel shall proceed to a port "with all convenient speed," then, if the

⁵ *Poussard v. Spiers*, 1 Q. B. D. 410.

⁶ Citing *Jackson v. Union Marine Ins. Co.*, L. R. 10, C. P. 141.

⁷ *Reindle v. Heath*, 115 Wis. 219. See also, *Hoffman v. King*, 70 Wis. 379.

⁸ *Weintz v. Hafner*, 78 Ill. 27.

delay does not frustrate the object of the contract, the stipulation as to time is a subsidiary promise to be compensated for in damages only.⁹

If A. agrees to lend money on mortgage upon the completion of a building which B. agrees to complete by a designated time, the stipulation as to time is subsidiary; and in the absence of an express agreement to that effect, A. is not entitled to repudiate the agreement because the building was not finished at that time.¹⁰

⁹ *Tarrebochia v. Hickie*, 1 Hurl. & N. 183.

¹⁰ *Holt v. United Security Co.* (72 Atl. 312), 76 N. J. L. 585.

CHAPTER IV.

IMPOSSIBILITY OF PERFORMANCE

§ 187. **Different Kinds of Impossibility.** When a promisor seeks to escape from liability under the contract on the ground that its performance was impossible, it is important to distinguish between an impossibility existing at the time of making the contract and an impossibility subsequently arising. If the impossibility existed at the period of the formation of the contract, a further distinction is to be noted between an external, physical or legal impossibility, (an objective impossibility) and a merely subjective impossibility.

An objective impossibility existing at the time the parties came to an agreement prevents the formation of a contract because it is an unreal consideration. *Impossibilium nulla obligatio est.* An objective impossibility exists when the promise is to do something, either impossible for any one to perform, or forbidden by law. A legal prohibition might also be regarded as making the contract void under the doctrine of illegality of object.

§ 188. **Existing Impossibility.** A contract for the sale of an article which, at the time, has ceased to exist, is an example of an objective impossibility, but such a contract is also void upon the ground of mistake. In *Clifford v. Watts*,¹ the defendant, a lessee, covenanted to dig from the demised premises not less than 1,000 tons of potter's clay annually, and it was held that the fact that there was not so much as 1,000 tons of clay under the land was a good answer to an action for the breach of the covenant. "They agree," said the court, "on the assumption it is there; and the covenant is applicable only if there be clay."

¹ L. R. 5, C. P. 577. See also, *Brick Co. v. Pond*, 38 Ohio St. 65; *Switzer v. Pinconning Mfg. Co.*, 59 Mich. 488.

In a lease of a mine of iron ore, the lessee covenanted to pay 35 cents for every ton raised, and also agreed to raise at least 1,500 tons of ore annually, "or in default thereof to pay a royalty of \$525 annually." In an action for two years' royalty the defence was that there was not so much ore under the ground. The court said:² "The lessees were without doubt bound to prosecute the work without delay; it was their duty to search for and to find the ore and to ascertain its quality; and if ore in sufficient quantity and of proper quality could be found, they were to raise 1,500 tons of it annually; failing in either, they were bound for the minimum stipulated royalty, of \$525 per year. If, however, it was established, by actual and exhaustive search, that at the time of the contract there was in fact no ore in the land, or no ore of the kind contracted for, it cannot be pretended upon any fair or reasonable construction of the contract, that the lessees were nevertheless bound for the 'royalty' of \$525 annually; for the payment of the royalty was undoubtedly based on the assumption of the parties that ore of the quality specified existed there. The subject of sale, it is true, is the exclusive right to mine the iron ore; but for that right the lessors were to be compensated according to the number of tons of 'clean and merchantable iron ore' mined; the lessees undertaking to mine 1,500 tons annually, 'or in default thereof' to pay \$525 royalty; and how could the lessees be in default in mining 1,500 tons annually if there was no ore to mine? We are not to construe the contract to require the lessees to perform an impossible thing."

But when a mining lease provides that, if a certain number of tons are not annually raised, then a given sum shall be paid, either as rent for the premises, or alternatively, the lessee is liable for the sum mentioned, and he takes the risk of there being no ore in the land.³

² *Muhlenberg v. Henning*, 116 Pa. St. 138. See also, *Woodworth v. McLean*, 97 Mo. 325.

³ *Clark v. Glasgow Ass. Co.*; 1 Macq., H. L. C. 668; *Bamford v. Lehigh Zinc Co.*, 33 Fed. Rep. 677; cf. *Flynn v. White Breast Co.*, 72 Iowa, 738. This is an alternative contract. See *ante*, Part v, ch. 2.

There seems to be one exception to the rule that a promise to do something legally impossible gives rise to no right of action, for it has been held that a promise of marriage, made by a married man to a woman, entitles her to sue for breach of the promise.⁴ It may be doubted if the reasons given for this exception are sufficient, and perhaps in such cases the injured party should have an action of deceit rather than an action for breach of contract.⁵

A subjective impossibility existing at the time of making the contract cannot be relied on by the promisor as a defence. Such impossibility is only relative, while an objective impossibility is absolute. The promisor is as fully liable for the breach of a promise impossible for him to perform, but not impossible for others, as if he had wilfully refused to perform it. "The clearest application of this rule is seen in the case of a debtor who promises to pay a sum of money which he neither has on hand nor can procure on credit. Money exists everywhere, and it is merely the personal situation of this debtor which prevents him from procuring it."⁶

§ 189. **The Old Rule as to Subsequent Impossibility.** It is generally laid down in the books that when the impossibility of performance arises after the formation of the contract, such impossibility, whether absolute or relative, whether owing to the fault of the promisor or not, is no excuse for his failure to perform. Thus, Sir W. Anson says: "Impossibility which arises subsequently to the formation of the contract

⁴ *Millward v. Littlewood*, 5 Ex. 775; *Kelley v. Riley*, 106 Mass. 339. But if the woman knows that the man is married there is no right of action. *Paddock v. Robinson*, 63 Ill. 99.

⁵ And it was so held in *Pollock v. Sullivan*, 53 Vt. 507. In Dig. 45, 1, 35, 1, a promise to marry one's sister is given as an illustration of a promise to do something forbidden by law, and, therefore, creating no obligation. *Pollock*, Contracts, 106, puts the right of action in such case on the ground of implied warranty, saying: "A person who promises marriage also promises or warrants that he is legally capable of marrying, and is, therefore, not less liable for a breach of the promise, though it may be questionable whether the actual promise to marry was not unlawful."

⁶ *Savigny Obligationen* i, § 37

does not, as a rule, excuse from performance. * * * If the promisor makes his promise unconditionally, he takes the risk of being held liable even though performance should become impossible by circumstances beyond his control.”¹ In *Baily v. De Crespigny*,² Hannen, J., says: “A man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified contract when the event which causes the impossibility was, or might have been, anticipated and guarded against in the contract, or when the impossibility arises from the act or default of the promisor.”

Some of the cases cited in support of this rule are cases of alternative contracts, to do one of two things. In such contracts, as has been previously shown, the principle is that if one of the alternatives becomes impossible of performance, the obligation of the promisor is concentrated upon the other which is also promised.³ Thus a contract to load or unload a ship within a certain time or to pay demurrage, is alternative, and the impossibility of unloading at the time concentrates the obligation of the promisor upon the payment of demurrage.

Other decisions relied on are cases where there is merely an impossibility of performing at the time stipulated, but no impossibility of performance afterwards, such as the destruction of a building by fire or flood in the process of erection which does not relieve the contractor from the obligation to rebuild afterwards.⁴ So the liability of a tenant to pay rent is not affected by the destruction of the demised

¹ Anson. Contracts (10th ed.), 341. And Pollock says, Contracts, 410: “It is admitted law that generally where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible.”

² L. R. 4 Q. B. 180.

³ *Ante*, pp. 353-360.

⁴ See *post*, sec. 192.

property, because that does not make it impossible for him to pay the rent.⁵

There are, however, some cases which enforce this rule as to subsequent impossibility in all the rigor of its unfairness.

Thus where the defendant agreed to take a ship to a certain island and there load a complete cargo of guano, it was held that he was not relieved from liability because there was not enough guano on the island to make up a cargo.⁶

A ship owner agreed to take a cargo to a certain port and there deliver it, and it was held to be no excuse that the goods were confiscated by a foreign power at that port.⁷

Where a bond was given for the return of a vessel at a time named "in as tight, staunch and good condition as she now is, reasonable wear and tear excepted," the surety was held liable on the bond for its non-return, although the vessel had been destroyed by a gale. The Court said: "The principle is that the party must perform his contract, and if loss occurs by inevitable accident, the law will let it rest upon the party who has contracted that he will bear it. * * * The party contracting assumes the responsibility for the consequences that may follow, if for any reason whatever he may be unable to perform his contract. He is an insurer to the extent of making good the loss."⁸

Sir W. Anson classifies the exceptions to this rule as follows: (1) Legal impossibility arising from a change in the law of our own country exonerates the promisor. (2) When the continued existence of a specific thing is essential to the

⁵ *Wagner v. White*, 4 H. & J. 564; *Stubbings v. Evanston*, 136 Ill. 37. It is otherwise when apartments in a building are leased. *Graves v. Berdan*, 26 N. Y. 498; *Bank v. Boston*, 118 Mass. 125; *Humiston v. Wheeler*, 175 Ill. 514.

⁶ *Hills v. Sughrue*, 15 M. & W. 233.

⁷ *Spence v. Chadwick*, 16 L. J. Q. B. 313. In *Taylor v. Taintor*, 16 Wall. 366, it was held (three Justices dissenting), that if a bailbond is conditioned for the appearance of a certain person at a particular time, his non-appearance is not excused by the fact that he was subsequently arrested and imprisoned in another State.

⁸ *Steele v. Buck*, 61 Ill. 343.

performance of the contract, its destruction from no default of either party operates as a discharge. (3) A contract which has for its object the rendering of personal services is discharged by the death or incapacitating illness of the promisor.

I venture to submit that the gradually extended application of these exceptions have killed the rule if ever it was the rule as thus broadly stated. It is always allowable for the Court to imply the continued possibility of performance as the condition of the contract,—as a part of their unexpressed intention. Justice obviously demands that such implication should be made unless contrary to the intention of the parties.

§ 190. **The True Principle as to Subsequent Impossibility** appears to be that when a party promises to do something at a future time, a subsequent impossibility of performance which is absolute and not merely relative or personal and not owing to his fault, discharges the liability unless, upon a fair construction of the contract, the promisor can be held to have guaranteed or warranted that performance would be possible, or to have agreed to be responsible for a non-performance. This implication is not to be made merely because a contract is absolute in its terms, or because, as was said above, “the impossibility might have been anticipated or guarded against.” Any impossibility might have been anticipated or guarded against.

Assuming risk. The obligation to be responsible if performance becomes impossible will be implied when that risk would have been put on the promisor at the time the contract was made if the matter had been thought of by the parties, or such appears to have been the intention of the parties.¹

Thus where a man charters a vessel for a particular purpose, since he selects that purpose and “chalks out the voyage,” the owner giving the use of his ship, the charterer

¹ Northern Pac. R. Co. v. Am. Trading Co., 195 U. S. 439.

is properly held to be liable if the object of the voyage can not be achieved. Under a charter party which provided that the vessel should proceed to the Lobos Islands for a cargo of guano, the contract is not dissolved, nor the charterer excused from liability for non-performance because the Peruvian government refused to permit the vessel to anchor, or to take guano from these islands, there being no saving clause in the contract to meet such a contingency.² Commercial intercourse with the port to which a ship was chartered was prohibited on account of an epidemic prevailing there, so that no cargo could be furnished, and yet the charterer was held to be liable on his undertaking to furnish one.³ The reason given for this was that the freighter was the adventurer who chalked out the voyage and the burden of the loss resulting from the prohibition by foreign law should be thrown upon him.

If the owner of an elevator has agreed to receive a certain quantity of grain, it is no excuse for failure to do so, that the storage capacity of the elevator has been taken up by third parties.⁴

When a charter party requires a vessel to be unloaded within a definite fixed time, it is held that the charterer assumes the risk of impossibility of performance at that time arising from the crowded condition of the docks, from a tempest or from any other unforeseen cause.⁵ But if under the contract the charterer has agreed to unload within a reasonable time, or according to the custom of the port, or with all despatch, then an impossibility of unloading within the customary time caused by crowded docks, or a strike, etc., is an excuse.⁶

² *Benson v. Atwood*, 13 Md. 20.

³ *Barker v. Hodgson*, 3 M. & W. 267, approved in *The Harriman*, 9 Wallace, 173. See also, *Jacobs v. Credit Lyonnais*, 12 Q. B. D. 589.

⁴ *Chicago, etc., R. Co. v. Hoyt*, 149 U. S. 1.

⁵ *Whitehouse v. Halstead*, 91 Ill. 95; *Williams v. Theobald*, 15 Fed. R. 465; *Thijs v. Byers*, 1 Q. B. D. 244.

⁶ *Postlethwaite v. Freeland*, L. R. 5 App. C. 621; *Hick v. Raymond* [1893], App. Ca. 22; *Empire Transp. Co. v. Phil. & R. Coal, etc., Co.*, 40 U. S. App. 157; 35 L. R. A. 623.

§ 191. **Implication of Continued Possibility of Performance.**

The maxims, *lex cogit ad impossibilia* and, *ad impossibile nemo tenetur*, as applied to contracts, mean that the subsequent impossibility of performance which liberates the promisor must not only be an insurmountable obstacle but its existence must also not be attributable to his default.¹ An absolute impossibility is created by some unavoidable accident or *vis major*, or the act of a third person, or of the public authorities. An earthquake, floods, wars, blockades, robbery may create this impossibility. But one who seeks to escape liability for this reason must also show that he was not himself at fault. Thus if a man has agreed to sell a particular object, its accidental destruction by fire or loss by theft discharges the contract. But if he retains an article unlawfully its accidental destruction does not liberate him. A wrongdoer is always *in mora*. If the promisor neglects to perform within a reasonable time, during which performance was possible, he is liable although performance becomes impossible afterwards.²

Illustrations. A contract provided that A. should drive logs down a stream to the Connecticut River for B. Before A. had a reasonable time in which to do so, the water in the stream suddenly fell and remained so low that further performance of the contract during the season contemplated was made impossible. This was held to be an excuse for non-performance, because the contract did not contemplate that A. should transport the logs in any way except down the stream.³ The Court said: "If the parties contemplated the failure of the water in the stream and contracted with reference to it, and it was agreed that the plaintiffs were to guarantee its sufficiency for driving logs, then they were not

¹ Art. 1148 of the Code Napoleon provides: "No damages for a breach are recoverable when, in consequence of *vis major* or accident, the promisor has been prevented from delivering or doing that which he promised, or has done that which was forbidden."

² *Arthur v. Wynne*, 14 Ch. D. 603; 49 L. J. Ch. 557.

³ *Clarksville L. Co. v. Harriman*, 68 N. H. 375. See also, *Keystone Co. v. Dole*, 43 Mich. 370; *Herter v. Mullen*, 159 N. Y. 28.

excused from the performance of the contract by the failure of water, and are answerable in damages. But if they contracted on the basis of the continued existence of sufficient water to transport the logs, and it was the understanding that the plaintiffs were only bound to drive them in case the water was adequate for that purpose, they were excused from the further performance of the contract."

If a flood destroys a canal by means of which the parties intended that certain goods should be transported, that is an excuse for a non-performance.⁴

When a contract requires that goods shall be made at a certain mill or factory its accidental destruction discharges the contract.⁵

Breach of a contract to run electric cars every day is excused when severe winter weather prevents it on certain days.⁶

The delay of a telegraph company in the transmission of a message is excused by a strike of its employees.⁷ The failure of a carrier to transport goods according to its contract is excused when the impossibility of doing so is caused by a strike of its employees or by a mob.⁸

⁴ *Lovering v. Buck Coal Co.*, 54 Pa. 291. But in *Harmony v. Bingham*, 12 N. Y. 99, the old inequitable rule was applied, and it was held that a contract to carry goods from A. to X. within twenty-six days is not discharged by the fact that the canal upon which they were to be transported was made impassable by a freshet. In *Hesser, etc., Co. v. La Crosse Co.*, 114 Wis. 658, it was held that breach of a contract to deliver two carloads of coal per week was not excused by the inability of the seller to procure the cars on account of a "car famine."

⁵ *Stewart v. Stone*, 127 N. Y. 500. But see *contra*, *Jones v. U. S.*, 96 U. S. 24; *Summers v. Hibbard*, 153 Ill. 102. If the contract does not contemplate that the goods shall be made at a particular factory, the destruction of the seller's factory does not excuse a breach. *Booth v. Spuyten D. R. Co.*, 60 N. Y. 491.

⁶ *Buffalo, etc., Co. v. Bellevue Land Co.*, 165 N. Y. 247.

⁷ *Sullivan v. W. U. Tel. Co.*, 82 S. C. 569; 22 L. R. A. (N. S.) 1214.

⁸ *Geisner v. Lake Shore, etc., R. Co.*, 102 N. Y. 563; *Pittsburg, etc., Co. v. Hollowell*, 65 Ind. 188.

§ 192. Impossibility of Performing at the Time Stipulated.

The rule that a subsequent absolute impossibility is an excuse for failure to perform is not applicable when the impossibility merely prevents performance at the particular time stipulated. The promisor must exercise diligence to overcome the obstacle, and must perform afterwards as soon as he can. Thus when a house is blown down by a hurricane while in the course of erection, the loss falls on the contractor who had agreed to erect it. He is under an obligation to rebuild and the owner of the land is under a corresponding obligation to permit him to rebuild.¹

Performance of a contract to build a house for another on the land of such person to be completed for use within a certain time, is not excused by the fact that there was a latent defect in the soil, in consequence of which the walls sank and cracked, and the house, having become uninhabitable and dangerous, had to be partially taken down and built on artificial foundations.² Where one agreed to build and complete a schoolhouse by a certain time, he is not relieved from liability on the contract because, when nearly completed, the building was destroyed by lightning.³ Failure to carry out a contract to dig a well is not excused by an accidental injury to the tools, etc., of the contractor.⁴

¹ *Milske v. Steiner Mantel Co.*, 103 Md. 235. See also, *Fildew v. Besley*, 42 Mich. 100.

² *Dermott v. Jones*, 2 Wallace, 1. See also, *Simpson v. U. S.*, 172 U. S. 372; *Filbert v. Philadelphia*, 181 Pa. 530. Most cases hold that the landowner is not responsible for the accuracy or sufficiency of the plans according to which the house is to be erected and that the contractor takes the risk as to them. *Daegling v. Schwartz*, 80 Ill. 322; *Lovergan v. San Antonio Co.*, 101 Tex. 63; 22 L. R. A. (N. S.) 364; *Thorn v. Mayor of London*, L. R. 9 Ex. 163, affirmed in L. R. 1 App. Cas. 120. But see *contra*, *Bentley v. State*, 73 Wis. 416.

³ *School District v. Dauchey*, 25 Conn. 530. And see *Thompkins v. Dudley*, 25 N. Y. 272; *Star v. Leonard*, 20 Minn. 494; *Trenton School Trustees v. Bennett*, 27 N. J. L. 513; *Clark v. Pope*, 70 Ill. 133; *Keel v. East Carolina Co.*, 143 N. C. 429; *Macfarland v. Barber Asphalt Co.*, 29 D. C. App. 506.

⁴ *Janes v. Scott*, 59 Pa. 178.

It will be seen in the next section that when the contract is not to build a house but to do work in it or on it, the accidental destruction of the house before the work is finished discharges the contract.

§ 193. **When the Continued Existence of a Thing is an Implied Condition.** If the contract can not be carried out unless a certain thing then existing shall continue to exist, the impossibility of performance arising from the destruction of that thing, without the fault of the promisor, is an excuse for failure to perform.

When one agrees to rent a hall at a future time, its accidental destruction by fire before that time discharges the contract.¹ So the death of an animal whose services have been contracted for liberates the promisor.² Where a vessel before she begins a voyage is so injured by fire that the cost of her repairs would exceed her value when repaired, and she is rendered unseaworthy and incapable of earning freight, a contract of affreightment is thereby dissolved.³ A breach of a contract to supply a hotel with water from a certain spring is excused by the drying up of the spring.⁴

Where the contract is to sell 200 tons of potatoes grown on certain land belonging to the promisor, and not 200 tons of potatoes generally, if the crop fails by reason of a blight, the promisor is excused, because "there was an implied term in the contract that each party should be free if the crop perished."⁵ But if the contract is to sell a certain quantity of grain and not specifically the grain to be raised on a designated farm, then the destruction of the crop which the seller intended to transfer is not an excuse for failure to

¹ *Taylor v. Caldwell*, 3 Best & Smith, 826. See also *Eliot Nat. Bank v. Beal*, 141 Mass. 566; *Dolan v. Rogers*, 149 N. Y. 489; *Walker v. Tucker*, 70 Ill. 527.

² *Shear v. Wright*, 60 Mich. 159.

³ *The Tornado*, 108 U. S. 342.

⁴ *Ward v. Vance*, 93 Pa. 499.

⁵ *Howell v. Coupland*, L. R. 9 Q. B. 462.

perform, since a delivery of a crop raised elsewhere would be a fulfilment of the contract.⁶

It has been previously shown that the sale of a thing not in existence is sometimes the sale of an expectancy, and is not dependent upon that thing's coming into existence.⁷ It has also been shown that in certain contracts there is an implied condition that a contemplated event will occur, and the contract is discharged if that event does not come to pass.⁸

Where the contract was for the sale of land to be conveyed at a future day and prior thereto an ocean storm washed away part of the land, specific performance of the contract was refused, and it would seem that both parties were discharged.⁹ So, where the contract was to convey a farm at a future time, and the dwelling-house on the land was burned down before the time appointed for the conveyance, it was held that the vendor could not recover or retain any part of the purchase money.¹⁰ When the contract is for the sale of specified articles of personal property at a future time,

⁶ *Anderson v. May*, 50 Minn. 280; 17 L. R. A. 555. In *Newell v. New Holstein Co.*, 119 Wis. 635, a contract for the sale of a quantity of canned tomatoes to be put up by the seller provided that "if by the destruction of the cannery by fire, or if on account of strikes, or from any other cause over which the seller has no control, he is prevented from performing this contract, he shall not be liable for any damages for such failure." It was held that the destruction by frost of the tomato crop on the seller's fields and in the neighborhood of his cannery did not liberate him, but that it was his duty to exercise due diligence to procure tomatoes from other sources. It would seem, however, that if it should be shown that tomatoes brought from a distance could not be properly canned, then the contract would be discharged.

⁷ *Ante*, p. 342.

⁸ *Ante*, p. 339.

⁹ *Huguenin v. Courtenay*, 21 S. C. 403.

¹⁰ *Wells v. Calnan*, 107 Mass. 514. In *Brewer v. Herbert*, 30 Md. 301, it was held that when a house is destroyed by fire after the property passes, although before conveyance or payment, the loss falls upon the buyer, upon the principle, *res perit domino*.

so that the title does not then pass, the subsequent destruction of the property discharges the seller from liability.¹¹

Destruction of house pending work in it. When the contract is not to build a house completely, but to do part of the work on it or to make repairs, and the house is destroyed before completion, the builder may recover a *pro rata* share of the contract price for the work performed and materials furnished before the fire; but neither party is liable for non-performance since it is an implied condition that the building shall continue in existence until the work is completed.¹²

§ 194. **Impossibility Caused By Illness or Death.** "Contracts for personal services, whether of the contracting party or of a third person, requiring skill, and which can only be performed by the particular person named, are not, in their nature, of absolute obligation, but are subject to the implied condition that the person named shall be able to perform at the time specified."¹ So in an action on a bail bond conditioned for the appearance of the prisoner in court on a certain day, the defence that he was prevented by illness from appearing then, but appeared as soon as he was able to do so, is good.²

In contracts of personal service, the continued illness or death, either of the party who is to perform the services

¹¹ *Dexter v. Norton*, 47 N. Y. 62.

¹² *Cook v. McCabe*, 53 Wis. 250; *Butterfield v. Byron*, 153 Mass. 517; *Whelan v. Ansonia Co.*, 97 N. Y. 293. See *ante*, § 183, notes 18 and 19. But the rule of some cases is that the destruction of the property excuses both parties from further performance, but gives a right of action to neither, and they are left where the impossibility placed them. *Appleby v. Myers*, L. R. 2 C. P. 651; *Krause v. Board of School Trustees*, 162 Ind. 278; *Siegel, Cooper & Co. v. Eaton & Prince Co.*, 165 Ill. 550.

¹ *Spalding v. Rosa*, 71 N. Y. 40. See also *Stewart v. Loring*, 5 Allen, 306; *Smith v. Preston*, 170 Ill. 179; *Robinson v. Davison*, L. R. 6 Exch. 269.

² *Scully v. Kirkpatrick*, 79 Pa. 324. If a tenant, who had intended to remove, remains in possession after the expiration of his term solely on account of illness, that is not such a holding over as will create a new tenancy. *Herter v. Mullen*, 159 N. Y. 28.

or of the party for whom they are to be performed, is ground for a discharge.³ Where a clerk is employed for three years to conduct a branch store, the death of the employer puts an end to the contract, and there can be no recovery for the balance of the salary.⁴ Where the illness of a servant is of more than a temporary nature, the employer may rescind the contract, but if he does not do so and takes the servant back into his employment after recovery, he can make no deduction for lost time.⁵

If full performance of a contract for personal services becomes impossible by illness or similar disability, the contractor may recover on a *quantum meruit* for what he did perform; and when, from the prevalence of an epidemic in the vicinity of a place where one has contracted to labor for a specified time, the danger is such as to render it unsafe for men of ordinary prudence to remain there, that is a sufficient excuse for non-performance.⁶

Illness as an excuse for non-performance applies only in contracts which require the personal services of the promisor and which can not be performed by deputy.⁷ Therefore, the insanity or illness of the insured is no excuse for a failure to pay the premiums on a policy of life insurance.⁸

³ *Lacy v. Getman*, 119 N. Y. 109; *Leopold v. Salkey*, 89 Ill. 412; *Stewart v. Loring*, 5 Allen, 306; *Billing's Appeal*, 106 Pa. St. 558; *Janin v. Browne*, 59 Cal. 44; *Siler v. Gray*, 86 N. C. 566; *Jennings v. Lyons*, 39 Wis. 553. In *Dewey v. Alpena School District*, 43 Mich. 480, it was held that a public school teacher may recover his salary for the stipulated time, although the school was suspended on account of the prevalence of smallpox. See *Libby v. Douglass*, 175 Mass. 120, to the same effect. Some cases hold that the death of a member of a firm terminates a contract for personal services to be rendered to it. *Tasker v. Shepperd*, 6 H. & N. 575. But other cases hold the contrary, especially when the firm's business continues. *Phillips v. Alhambra Palace Co.* [1901], 1 Q. B. 59; *Nickerson v. Russell*, 172 Mass. 584.

⁴ *Yerrington v. Greene*, 7 R. I. 589.

⁵ *Bast v. Byrne*, 51 Wis. 531; *Cuckson v. Stone*, 1 E. & E. 248.

⁶ *Lakeman v. Pollard*, 43 Me. 463.

⁷ Cases in note 1, *supra*.

⁸ *Wheeler v. Conn. Mutual Co.*, 82 N. Y. 543; *Klein v. N. Y. Life*, 104 U. S. 252; *Carpenter v. Centennial Co.*, 68 Iowa, 453. Some of

It has been held that the ill health of a man does not liberate him from a promise to marry, although the illness is of such a nature as to make it hazardous for him to marry, and that no disease is an excuse for breach of this particular contract unless it be such as to render consummation of the marriage impossible.⁹ But the better doctrine is that of other cases which hold that a disease which unfits a party for marriage is an impossibility which excuses a breach.¹⁰

§ 195. **Legal Impossibility.** The clause in the Federal Constitution providing that no State shall pass any law impairing the obligation of contracts does not prevent a State from making that unlawful which had already been made the object of a contract.¹ If after the making of a contract to do something at a future time, which is then lawful, a statute is passed which prohibits the doing of that thing the contract is terminated and the parties discharged.² And so, if by an injunction, or other sovereign power, the performance of a contract becomes illegal, the contract is not broken, but discharged.³

Where premises are leased to be used for the sale of intoxicating liquor, the subsequent enactment of a statute prohibiting the sale of liquor in that locality discharges the contract.⁴

the cases as to the effect of incapacitating illness or insanity on failure to pay insurance premiums when due are collected in a note to *Hipp v. Fidelity, etc., Co.*, 12 L. R. A. (N. S.) 319.

⁹ *Smith v. Compton*, 67 N. J. L. 550; *Hall v. Wright*, 29 L. J. Q. B. 43; *El. B. & E.* 746.

¹⁰ *Gring v. Lerch*, 112 Pa. 244; *Edmonds v. Hughes*, 115 Ky. 561; *Sanders v. Coleman*, 97 Va. 690; *Allen v. Baker*, 86 N. C. 91; *Shakelford v. Hamilton*, 93 Ky. 80; 15 L. R. A. 531. In the last two cases the incapacitating disease was venereal, and in such cases the defendant should be held liable in damages for having himself created the moral impossibility. or the disease may be regarded as a repudiation of the contract by conduct.

¹ Cooley, *Constitutional Limitations*, 284.

² *Cordes v. Miller*, 39 Mich. 581; *Am. Mercantile Ex. v. Blunt*, 102 Me. 123; *Baily v. De Crespigny*, L. R. 4 Q. B. 180.

³ *People v. Globe, etc., Ins. Co.*, 91 N. Y. 174.

⁴ *Sherman v. Wilder*, 106 Mass. 537; *Heart v. East Tenn. Brewing Co.*, 121 Tenn. 69; 19 L. R. A. (N. S.) 965.

But if the premises are not leased for that specific purpose and the lessee has the right to use them for other purposes, then such subsequent statute does not terminate the agreement.⁵

A carrier is not liable for delay or injury to goods it has agreed to transport caused by the enforcement of a valid quarantine regulation.⁶

If the change in the law occurs after a part performance, there may be a recovery for the value of the part performed.⁷

§ 196. **Impossibility Created by the Promisee.** An impossibility created by one party before performance is due or

⁵ *Miller v. Maguire*, 18 R. I. 770; *Lawrence v. White*, 131 Ga. 840. After the conveyance of land to be used as a cemetery, the enactment of a statute prohibiting its further use as such operates to annul the condition, and the title becomes vested absolutely in the grantee. *Scovil v. McMahon*, 62 Conn. 378; 21 L. R. A. 58.

⁶ *St. Louis, etc., R. Co. v. Smith*, 181 U. S. 428. It is otherwise if the carrier knew that its contract could not be performed on account of a quarantine. *The Normannia*, 62 Fed. Rep. 469.

⁷ *Jones v. Judd*, 4 N. Y. 411. In *Wentink v. Passaic*, 66 N. J. L. 67, there was a contract made by a municipal corporation within its authority which was set aside for irregularity after plaintiff had done work under it. He sued for expenses and profits. The Court said: "The question in this case is as to what must befall one whose contract, through no fault of his own, is by force of law annulled, while yet unperformed. Clearly he can not sue on the contract, for it has no longer legal existence. This disposes of any claim of the present plaintiff for profits. But until set aside the contract was as between the parties to it entirely valid, and its annulment subjected those parties to all just equities. Where there is a prevention of performance of a valid contract, through the fault of a defendant, the measure of the plaintiff's damages is generally for the work done, such a proportion of the entire price as the fair cost of that work bears to the fair cost of the whole work, and in respect to work not done, such profit as he would have realized by doing it. In the case in hand the performance of the contract was not prevented by any fault of the defendant, but by *vis major*. The making of the contract was, however, induced by such fault; and on its annulment the defendant should answer as on a *quantum meruit*, for the work done thereunder. This obviates the difficulty existing in that class of cases where a blameless party is entitled to recover for what has been done under a contract not legally enforceable that the other party refuses to perform. In such cases recovery depends upon benefit and perhaps is limited to benefit."

in the course of performance discharges the contract and gives the other party a right of action.¹ So where A. agreed to cut hay for B. and the latter fearing that A. would not be able to perform the service, employed other persons to do the work, this creates an impossibility and B. can not charge A. with the consequences of his failure to perform.²

If the performance of a condition for the valuation of an article by third persons be rendered impossible by the act of the vendee, the price of the thing sold must be fixed by the jury on a *quantum valebat*.³ A party who has performed part of a contract according to its terms, and is prevented from completing it by the fault of the other party, is entitled to compensation for the work performed, and damages for the breach of the contract.⁴ If an act is to be performed at a certain time and place, and a strict performance of it is prevented by the absence of the party who has a right to claim it, the law will not permit him to set up the non-performance of the act as a bar to the responsibility which his part of the contract had imposed on him.⁵

¹ See the next chapter as to renunciation of a contract before or during performance, and *ante*, pp. 318, 319, as to preventing performance of conditions.

² U. S. v. Peck, 102 U. S. 64.

³ Humaston v. Tel. Co., 20 Wallace, 28.

⁴ Chicago v. Tilley, 103 U. S. 143; Black v. Woodrow, 39 Md. 216.

⁵ Williams v. Bank, 2 Peters, 102; Brown v. Rasin Monumental Co., 98 Md. 1.

CHAPTER V



DISCHARGE OF CONTRACT BY BREACH

§ 197. Effect of Breach in General —Failure of Performance.

A party may break his contract by failing to perform it in whole or on part, or by a renunciation of it, that is, by declaring his purpose not to carry it out, or by disabling himself from performing it, or by making it impossible for the other party to perform his part.

Any failure of the promisor to perform fully is a breach, and every breach entitles the promisee to demand that he be compensated for the injury that may be thus caused. But every breach does not authorize the other party to rescind the contract, or to treat it as abandoned, or to refuse wholly to perform his counter promise. If the breach is of a trifling character, or is merely the failure to perform a subsidiary promise, or a part of a divisible contract, then the only right of the other party is an action for damages, or to enforce a counterclaim or recoupment. He is not on that account released from liability.

But when one party's failure to perform, relates to a substantial part of the contract, then the other party has the right either to demand compliance with the contract, or to refuse to perform his own promise, or to rescind the contract and treat it as at an end except for the purpose of bringing an action. No general rule can of course be laid down as to what constitutes a substantial breach, or as to its effect upon the rights of the other party, since it depends upon the nature of the contract in each case. The question as to what constitutes a substantial breach in a contract by failure to perform in the case of conditional and divisible contracts has been considered in a previous part of this work.¹ In regard to entire contracts, that question has also been considered in

¹*Ante*, Part v, chapters 1 and 4.

dealing with the time and mode of performance.² Cases have also been cited to exhibit the nature of a subsidiary promise, the breach of which does not operate to put an end to the contract but merely gives a claim to compensation for the breach.³

In the case of a contract for the delivery of goods during a year, payments monthly for the delivery in the preceding month, and the buyer fails to pay for three months, the seller may rescind; and if after notice of rescission, the seller accepts payment of part of what he is due, he does not waive his right to refuse to make further deliveries.⁴

Failure to pay for part of the goods delivered and refusal to give notes for another part as agreed upon, justifies a rescission.⁵ If a dealer has agreed to buy all his ice from a certain company for one year at a certain price but purchases a part of his supply from others, the seller is justified in rescinding the contract for such breach.⁶

§ 198. Rescission for Breach. When there has been a substantial breach of the contract, the other party has the right to rescind the contract for that reason, or to refuse to perform his part and sue for damages.¹ But he is not required to rescind for a breach not amounting to a repudiation. He

² *Ante*, Part vi, chapter 3, § 183.

³ *Ante*, § 186.

⁴ *Eastern Forge Co. v. Corbin*, 182 Mass 590. See, *Purcell Co. v. Sage*, 200 Ill. 342, to the same effect. But in the case of a building contract the mere failure to pay an instalment of the price when due does not authorize the builder to abandon the work. *Chamberlin v. Booth*, 135 Ga. 719. In other contracts a failure to pay on delivery is not always a breach going to the root of the contract. *Nat. Machine Co. v. Standard Co.*, 181 Mass. 275.

⁵ *Kokomo Co. v. Inman*, 134 N. Y. 92. See also *Hess Co. v. Dawson*, 149 Ill. 138; *Sitman v. Lindsay*, 123 La. 53; *Webster v. Moore*, 108 Md. 572; *Gibney v. Curtis*, 61 Md. 198.

⁶ *Stone v. West Jersey Ice Co.*, 65 N. J. L. 24.

¹ *Anvil Mining Co. v. Humble*, 153 U. S. 540; *Wharton v. Winch*, 140 N. Y. 287; *Lee v. Briggs*, 99 Mich. 487. When a buyer refuses to accept the goods at the time specified in the contract for their delivery, the seller is not obliged to ship them, or to make an offer to deliver, but may treat the buyer's refusal as a rescission of the con-

may continue to perform his part and merely claim damages for the other party's breach.²

The expression "rescission of a contract" sometimes means the annulment of the agreement for mistake or fraud, or some other defect in an essential requisite. It sometimes means the extinguishment of the contract by mutual agreement. But in this connection, it signifies the right of one party to put an end to a contract on account of a substantial breach of it by the other party. When that right is exercised, he is absolved from performance of his own promise and may sue for such damages as the breach has caused.³ This right to rescind is not lost merely because the contract has been performed in part on either or both sides.⁴

Waiver of right to rescind. If a party does not choose to exercise his right of rescission for a substantial breach but continues to accept a subsequent performance from the other party or to accept goods which are not in accordance with the contract, the rule of most cases is that such waiver of the right to rescind the contract is not in itself a waiver of the right to claim damages.⁵

tract, and the buyer has no right afterwards to demand delivery. *Koch v. Wimbrow*, 111 Md. 22. As to what is a substantial breach, see generally, *Weintz v. Hafner*, 78 Ill. 29; *Hichborn v. Bradley*, 117 Ia. 130; *Harnden v. Milwaukee, etc., Co.*, 164 Mass. 382.

If the party who rescinds has performed in part, he is entitled to compensation. *Nash v. Towne*, 5 Wallace, 689; *Cockey v. Muller*, 71 N. Y. 367; *Parker Coal Co. v. O'Hern*, 8 Md. 201.

² *Beatty v. Howe Lumber Co.*, 77 Minn. 272. See *ante*, p. 389.

³ *Phillips, etc., Co. v. Seymour*, 91 U. S. 626; *Hill v. Blake*, 97 N. Y. 216; *Wolf v. Schlacks*, 67 Ill. App. 117.

⁴ *Ankeny v. Clark*, 148 U. S. 345; *Snow v. Alley*, 144 Mass. 546.

⁵ *Phillips, etc., Co. v. Seymour*, 91 U. S. 646; *Rockwell Co. v. Cambridge Co.*, 191 Pa. 386; *Redland, etc., Assn. v. Gorman*, 161 Mo. 203; 54 L. R. A. 718; *Shupe v. Collender*, 56 Conn. 489. But see *contra*, *America Theatre Co. v. Siegel, Cooper & Co.*, 221 Ill. 145; 4 L. R. A. (N. S.) 1167; *Talbot Co. v. Gorman*, 103 Mich. 403; 27 L. R. A. 96; *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515. In the case of a sale of a chattel, when there is a warranty against defects, etc., most cases hold that the acceptance of the article with knowledge of the defects is not a waiver of the right to recover damages for breach of the warranty. *Holloway v. Jacoby*, 120 Pa. 583; *Central Trust Co. v. Arctic Co.*, 77 Md. 202; *Fitzgerald v. Evans*, 49 Minn. 541; *Branson v.*

When a contract requires the seller to deliver goods as demanded during a certain period of time, and he fails or refuses to make a delivery as requested, thus giving to the buyer the right to rescind the contract, then, if the buyer afterwards demands and receives other goods, he may be held to have waived his right to rescind the contract. But by thus waiving his right to rescind, the buyer does not waive his right to claim damages for the breach by the seller's failure to make the prior delivery as demanded. Thus, where a buyer was entitled to demand 600 tons of ice each week during a certain period, and the seller refused or was unable to deliver more than 300 tons, the buyer, merely by accepting the 300 tons, does not waive his right to the stipulated amount, and is not prevented from afterwards recovering damages for the failure of the seller to deliver that amount.⁶

When the contract provides that goods be delivered within a certain time, this stipulation may be waived by the buyer, and if waived he is not entitled to recoup against the seller's claim for the price any damages sustained by reason of the non-delivery within the time agreed upon. But the mere acceptance of the goods after the expiration of the time fixed for delivery is not of itself a waiver of the breach committed by the failure to deliver according to the terms of the contract, nor does such acceptance preclude the buyer from recovering the damages resulting from such breach or from recouping those damages against the seller's claim for the price.⁷

Turner, 77 Mo. 489; *North Alaska Salmon Co. v. Hobbs*, 159 Cal. 380; 35 L. R. A. (N. S.) 502. *Contra*: *Northfield Bank v. Arndt*, 132 Wis. 383; 12 L. R. A. (N. S.) 82. Some cases make a distinction between an express and an implied warranty. *Waeber v. Talbot*, 167 N. Y. 48.

⁶ *Sumwalt Ice Co. v. Knickerbocker Co.*, 112 Md. 437.

⁷ *Bagby v. Walker*, 78 Md. 239. If a man contracts for a certain quantity of goods and accepts a lesser quantity as a compliance with the contract and pays the full price, not knowing that the full amount had not been delivered, he is entitled to recover for the deficiency. *Denton v. Gill & Fisher*, 102 Md. 386.

The execution of notes for a part of the purchase price of a harvester machine after its delivery and trial is not a waiver of the defects therein when the seller at the time such notes were given, promised to repair it and make it comply with the terms of the warranty.⁸

After a breach if, instead of a *rescission in invitum*, the parties agree to terminate the contract, it is not a waiver of the damages for the breach, unless the agreement can be treated as an accord and satisfaction.⁹

§ 199. **Renunciation of Contract. Anticipatory Breach.** If one party to an executory contract, before the time for performance arrives, announces to the other that he will not abide by it, in other words, if he absolutely and unequivocally renounces and repudiates the contract, the other party has a right to do either one of two things. He may (1) accept the renunciation by words or conduct, and treat such announcement as a breach of the contract which absolves him from performance on his part and entitles him to sue for damages, or (2) he may refuse to accept such renunciation in advance as a breach, wait until the time fixed for performance arrives, and then demand fulfilment of the contract and sue if it be refused. If he adopts the second of these alternatives, he can not afterwards change his mind and assert that the contract was terminated at the time it was repudiated.¹

In *Michael v. Hart*,² the Master of Rolls said: "Where there has been what has been called an anticipatory breach of contract, going to the whole consideration, it has not of itself the effect of rescinding the contract for there must be

⁸ *Osborn v. Carpenter*, 37 Minn. 331.

⁹ *Morehouse v. Second Nat. Bank*, 98 N. Y. 503.

¹ *Avery v. Bowden*, 5 El. & B. 714; *Zuch v. McClure*, 98 Pa. 541. If the promisee adopts the second alternative, the promisee can not perform his own part and sue for the price. See section as to countermanding.

² [1902] 1 K. B. 490. See also *Eckenrode v. Chemical Co.*, 55 Md. 59; *Smoot's case*, 15 Wallace, 36.

two parties to a rescission. It only has the effect of giving the other party to the contract an option to treat the repudiation of the contract as a definitive breach of it, and thereupon to treat the contract as rescinded, except for the purpose of his bringing an action for breach of it. * * *. On the other hand, he may refuse to treat the contract as rescinded and hold the party repudiating the contract to his obligation when the time fixed for performance arrives."

Thus when there has been a sale of goods on credit, if the buyer repudiates the contract, the seller may either accept his renunciation as a breach and sue for damages, or he may wait until the expiration of the term of credit and sue for the price.³

In *Johnstone v. Milling*,⁴ it is said: "The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he, too, treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He can not, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when, in the ordinary course, a cause of action on the contract would arise. He must elect which course he will pursue."

The renunciation must be absolute, that is, a distinct refusal to be bound by the contract and not a mere statement that the party would probably not perform or may be unable to do so.⁵ The acceptance of the renunciation must also be

³ *Tatum v. Ackerman*, 148 Cal. 357.

⁴ L. R. 16 Q. B. 467. See, *Shaffner v. Killian*, 7 Ill. App. 620.

⁵ *Dingley v. Oler*, 117 U. S. 490. If one party repudiates the contract he can not be heard to complain that the other party did not perform. *Hinckley v. Pittsburgh, etc., Co.*, 121 U. S. 264; *Textor v. Hutchings*, 62 Md. 150; *Cort v. Ambergate Ry. Co.*, 17 Q. B. 127; *Carpenter v. Holcomb*, 105 Mass. 280; *Bascom v. Smith*, 164 Mass.

made. Therefore, if one of the parties to a contract after repudiating it, withdraws his renunciation within a few minutes and before the other party has done or said anything to show that he accepted, then the contract has not been broken.⁶

§ 200. **Effect of Countermanding—Damages.** A party has a right to break an executory contract before performance by the other party. In some cases, it is not only to his advantage to do so but it also may be his duty in fairness to the other party. Thus, if a man has contracted for the erection of a house or the performance of other work for him without counting the cost, or if it afterwards appears that a change in his circumstances renders the object of the contract no longer desirable, he has the right to notify the other party not to perform. In such case, he is liable only for the actual damages suffered by the other party, and the latter is not entitled to proceed to execute the contract after such notice and sue for the contract price.¹

In the course of performance. If one of the parties repudiates the contract in the course of performance, the other party has the right not only to recover damages for the breach, which include the profits he would have made, but also the value or price of what he did perform.²

61. In *General Billposting Co. v. Atkinson* [1909], App. Cas. 118, it is said that the broad ground, applicable to entire as well as divisible contracts, is that when one party repudiates a contract—evinces an intention no longer to be bound by it—the other party is justified in rescinding and in treating himself as absolved from further performance of it on his part.

⁶ *Swigert v. Hayman*, 56 W. Va. 123.

¹ *Clark v. Marsiglia*, 1 Denio, 317; *Johnson v. Meeker*, 96 N. Y. 93; *Heaver v. Lanahan*, 74 Md. 493; *Collins v. Delaporte*, 115 Mass. 159; *Gibbons v. Bente*, 51 Minn. 500; *Ward v. Am. Health Food Co.*, 119 Wis. 25. But see *contra*, *Roebling Co. v. Lock Stitch Co.*, 130 Ill. 660.

² *U. S. v. Behan*, 110 U. S. 344; *Black v. Woodrow*, 39 Md. 216; *Eckenrode v. Chemical Co.*, 55 Md. 58; *Cort v. Ambergate Ry. Co.*, 17 Q. B. 127. See also *Cook v. Gray*, 133 Mass. 106; *Connolly v. Sullivan*, 173 Mass. 1.

§ 201. **Time of Bringing Suit on Renunciation.** In *Hochster v. De la Tour*,¹ it was held for the first time that a renunciation of the contract by one party before performance was due not only discharged the other party from obligation to perform but entitled him to sue at once for the breach without waiting for the time of performance to arrive.

This rule has been adopted in most of the American cases which have considered the subject.² But in a few other cases it is denied, and the old rule adhered to, namely, that, "in order to charge one in damages for the breach of an executory personal contract, the other party must show a refusal or neglect to perform at a time when, and under conditions such that he is or might be entitled to require performance."³

§ 202. **Repudiation by Conduct—Preventing Performance.** When one party to a contract prevents the other from performing, or puts it out of his own power to perform his part, the other party may treat the contract as terminated and recover whatever damage he has sustained.¹ If the contract

¹ 2 E. & B. 678, decided in 1852, followed in *Frost v. Knight*, L. R. 7, Exch. 114; *Synge v. Synge* [1894], 1 Q. B. 466; *Mersey Steel Co. v. Naylor*, L. R. 9 App. C. 435.

² *Roehm v. Horst*, 178 U. S. 1; *Stokes v. McKay*, 147 N. Y. 223; *Kadish v. Young*, 108 Ill. 170; *Remy v. Olds*, 88 Cal. 537; *Holloway v. Griffith*, 32 Iowa, 409; *Hosmer v. Wilson*, 7 Mich. 294; *Platt v. Blaul*, 26 Mich. 173; *Zuck v. McClure*, 98 Pa. 541; *O'Neill v. Supreme Council*, 70 N. J. L. 410; *Wells v. Hartford Co.*, 76 Conn. 27. The rule of *Hochster v. De la Tour* was discussed in *Dugan v. Anderson*, 36 Md. 584; *Dillon v. Ins. Co.*, 44 Md. 392; *Textor v. Hutchings*, 62 Md. 150. In *Lewis v. Tapman*, 90 Md. 308, it was held that when there is a promise to marry at a future time, and the defendant before that time renounces the contract, an action may be brought at once without waiting for the expiration of the time agreed upon. But the Court expressly said that it did not adopt *Hochster v. De la Tour* further than as applicable to an action for breach of promise to marry.

³ *Daniels v. Newton*, 114 Mass. 530. See also, *Stanford v. McGill*, 6 N. Dak. 536; *King v. Waterman*, 55 Neb. 324; *Perkins v. Frazer*, 107 La. 390.

¹ *Chicago v. Tilley*, 103 U. S. 146; *Lovell v. Ins. Co.*, 111 U. S. 274; *Hinckley v. Pittsburg Steel Co.*, 121 U. S. 264; *Nichols v. Scranton Steel Co.*, 137 N. Y. 485; *Hocking v. Hamilton*, 158 Pa. 107; *Synge*

can not be performed by one party unless the other does a concurrent act, the failure of the latter to perform that act, is a breach although the obligation to do so may be only implied.²

When a contract imposes upon one party the duty to pay the price of property by a certain day, if the other party purposely keeps out of the way, so that tender can not be made, that is a breach of his implied obligation to receive payment and affords a right of action.³

"A party who disables himself from performing his contract before default by the other party, waives the performance of acts by the latter which, except for such disability, he would be bound to perform as a condition precedent for recovery on the contract."⁴

§ 203. **Breach by Failure of Consideration.** The expression, "failure of consideration," sometimes used to designate a breach of contract, is a vague term which has no definite technical import. It sometimes means such a material mistake as to the subject matter of the contract as renders it void according to the principles set forth in a previous chapter

v. Synge [1894], 1 Q. B. 466. In *Western Union Tel. Co. v. Semmes*, 73 Md. 9, the plaintiff contracted with the defendant company to conduct for it certain litigation for a compensation contingent upon success, and pending the suit, the defendant, without plaintiff's consent, compromised and settled the controversy. It was held, first, that the plaintiff was entitled to reasonable compensation for the work actually done, but not to the sum agreed upon as the contingent fee, and, secondly, that it was neither necessary nor competent for the plaintiff to prove that the litigation would have been successfully concluded.

²*Foternick v. Watson*, 184 Mass. 187; *Howard v. Am. Mfg. Co.*, 162 N. Y. 347; *Cook v. Columbian Oil Co.*, 144 Cal. 670; *Mackay v. Dick*, L. R. 6, App. Cas. 263, per Lord Blackburn, approved in *Sprague v. Booth* [1909], App. Cas. 580.

³*Loehr v. Dickson*, 141 Wis. 332. See also, *Connely v. Haggerty*, 65 N. J. Eq. 596, and *ante*, p. 318.

⁴*Woolner v. Hill*, 93 N. Y. 581. See also, *Planche v. Colburn*, 3 Bingham, 14; *Fitzgerald v. Allen*, 128 Mass. 232. When one party is to perform before the other, the latter may bring an action for the first party's failure to perform, although he has not himself performed. *Meriden B. Co. v. Zingsen*, 48 N. Y. 247.

of this work dealing with mistake in the formation of a contract. Thus where a man buys, or agrees to buy, an article to which the seller has no title, it is said that there is a failure of consideration.¹

The term is also loosely used to describe a failure of performance, as where an inferior article is delivered and used in place of the one contracted for, in which case the buyer is said to be entitled to a reduction from the price for the partial failure of consideration.²

The term "failure of consideration" is often employed to indicate an unreal or illusory consideration. So in a contract to buy a forged instrument,³ or a worthless article,⁴ there is said to be a failure of consideration.

It has been held that if one buys the bonds of a municipality which are void because issued without authority the amount paid may be recovered upon this ground.⁵ But a different and questionable ruling has been made as to the effect of a contract to buy bonds afterwards adjudicated to be void.⁶ It would seem that the construction of the contract in such case should depend upon whether the agreement was for the sale of a chance or not, *i. e.*, whether the parties dealt on the assumption of the validity of the bonds, or the buyer can be held to have run the risk.⁷ If I agree to buy your next year's crop of oranges and pay you in advance, then, if the crop wholly fails, I may recover the amount paid if the contract was conditioned upon its coming into existence; but if what I bought was your chance or expectation of a crop, then,

¹*Disharoon v. Waters*, 114 Md. 456; *Flandron v. Hammond*, 148 N. Y. 129. See, *ante*, p. 171.

²*Rasin v. Conley*, 58 Md. 59; *Walker v. Pue*, 57 Md. 155.

³*Wood v. Sheldon*, 42 N. J. L. 421; *Thompson v. McCullugh*, 31 Mo. 224.

⁴*Ripley v. Case*, 78 Mich. 126. So a promise to pay for a void patent is without consideration. *Nash v. Lull*, 102 Mass. 60.

⁵*Paul v. Kenosha*, 22 Wis. 266.

⁶*Otis v. Cullum*, 92 U. S. 447.

⁷See, *Penniman v. Winner*, 54 Md. 135; *Herzog v. Heyman*, 151 N. Y. 587.

although the crop fails, I got what I bargained for and can not recover what I paid.⁸

In the cases above mentioned of the sale of forged instruments on the sale of that which the seller does not own, the true principle is, not that the consideration has failed, but that there is an implied warranty of genuineness or of title.⁹ ✓

⁸See *ante*, p. 342.

⁹*Strauss v. Hensey*, 7 D. C. App. 289; 36 L. R. A. 92; S. C. 9 D. C. App. 544.

CHAPTER VI

DISCHARGE OF CONTRACT BY OPERATION OF LAW

§ 204. **Merger, Etc.** In a few instances the law says that a contract which has neither been performed nor broken shall come to an end. This termination of a contract by operation of law is to be distinguished from the extinguishment of the right of action which one party possesses on account of a breach of the contract by the other party. This matter is considered in the next chapter.

The acceptance of a higher security in place of a lower operates *ipso facto* to extinguish and merge the lower. Thus a simple contract is merged in a contract under seal between the same parties covering the same subject-matter, and a contract under seal, or simple contract, is merged in a judgment.¹

Bankruptcy. The effect of the Federal Bankrupt Act is to put an end to the contracts of the persons who are discharged under the law from their debts. When there is no Federal Act in force the insolvent laws of the States may have the same effect as between debtors and creditors resident in the same State.

§ 205. **Alteration of a Written Instrument.** The general rule is that if a written contract be altered by addition or erasure by one party, without the consent of the other, in a material particular, the liability under the instrument of the innocent party is discharged.¹ "The grounds of discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its ident-

¹ Holmes v. Bell, 3 M. & G. 213; Clifton v. Iron Co., 74 Mich. 183; Moale v. Hollins, 11 G. & J. 11; Matthews v. Dare, 20 Md. 249; Keefer v. Zimmerman, 22 Md. 274.

¹ Angle v. N. W. Ins. Co., 92 U. S. 330; Gordon v. Third Nat. Bank, 144 U. S. 97; Shiffer v. Mosier, 225 Pa. 552; Osgood v. Stevenson, 143 Mass. 399.

ity is changed; another is substituted without his consent; and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may well plead that it is not his deed; and if it be not under seal, that he did not so promise. In either case, the issue must necessarily be found for him. To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument as to the party sought to be wronged."²

From the rule as above stated it follows: (1) That in order to discharge a contract, the alteration must have been made by a party to it and not by a stranger; (2) That the alteration must have been made without the consent of the other party; (3) That it must be material; (4) That the party making the alteration can not rely upon the instrument as it was before the alteration.

Rules as to effect of alterations. (1) The alteration must have been made by a party to the contract, or by some third person at his direction. If it was made by the defendant, or by some third person without the plaintiff's consent, it has no effect and the contract will remain as it originally stood, provided the nature and extent of the alteration (called in this case a spoliation) can be clearly seen, and it can be ascertained what the contract was when executed.³

In the case of negotiable instruments altered by one holder and then transferred to a *bona fide* purchaser for value, there is a conflict of authority as to the liability of the maker, to the holder and as to whether the holder is entitled to recover the amount as originally written.⁴ The Negotiable Instru-

² Wood v. Steele, 6 Wallace, 82.

³ Martin v. Tradesmen's Ins. Co., 101 N. Y. 498; Bellows v. Weeks, 41 Vt. 390. Cf. Morrison v. Welty, 18 Md. 169, where the wife of the payee of notes playfully affixed seals to the signatures.

⁴ Yocum v. Smith, 63 Ill. 321; Brown v. Reed, 79 Pa. 370; Greenfield Savings Bank v. Stowell, 123 Mass. 196; Holmes v. Tremper, 22 Mich. 427; Crawford v. West Side Bank, 100 N. Y. 50; Burrows v. Klunk, 70 Md. 451.

ments Act, in force in several States, provides that the holder may enforce the note according to its original tenor.

The rule that where one of two innocent persons must suffer by the wrongful act of a third, he must bear the loss who put it in the power of the third person to do the wrong, has no application in a case where the third person fraudulently altered a commercial instrument (such as a bill of lading) issued to him by one of the parties. In that case the assignee of such altered instrument acquires no rights thereunder.⁵

(2) The alteration must have been made without the consent of the party sought to be charged. But the maker of an instrument may expressly or impliedly authorize another party to fill in blanks, or make other alterations, or he may subsequently ratify them.⁶

(3) The alteration must be material. An immaterial alteration even though fraudulently made, does not avoid the contract, while a material alteration even though innocently made, does avoid it.⁷

A material alteration is one that changes the legal effect of the instrument. The question whether an alteration was made or not is for the jury; the question of its materiality *vel non*, for the Court.⁸ The alteration of the date, whether

⁵ Merchants' Bank v. Steamboat Co., 102 Md. 573. See as to rights of assignee of altered instrument, Schwartz Sons v. Wilmer, 90 Md. 136; Merritt v. Boyden, 191 Ill. 136; Weidman v. Symes, 120 Mich. 657.

⁶ Allen v. Withrow, 110 U. S. 128; Carr v. McColgan, 100 Md. 462; Owen v. Perry, 25 Iowa, 412. As to the authority to make alterations, see Merritt v. Dewey, 218 Ill. 599. As to alteration of deed after delivery, see note to Waldron v. Waller, 32 L. R. A. (N. S.) 284, and Clark v. Creswell, 112 Md. 339.

⁷ Gordon v. Third Nat. Bank, 144 U. S. 97; Miller v. Reed, 27 Pa. 244; Burlingame v. Brewster, 79 Ill. 515; Leonard v. Phillips, 39 Mich. 172; Fuller v. Green, 64 Wis. 159. Cf. Outtoun v. Dulin, 72 Md. 536.

⁸ Steel v. Spencer, 1 Peters, 552; Booth v. Powers, 56 N. Y. 29.

it hasten or delay the time of payment is material.⁹ The name of the obligee is a material part of a bond.¹⁰ The addition of a name to a promissory note, without the knowledge of a surety, is such an alteration as releases him.¹¹ Where after a bond has been signed by two sureties with the understanding between them and the obligor and obligee that it was to be signed by a third surety whose name was written in the bond, and the name of such third surety was altered in the body of the instrument, with the knowledge of the obligee, by the substitution of a different surety, who then signed the bond, it was held that the first two sureties were discharged.¹²

An immaterial alteration is one that does not affect the instrument in a legal sense, as writing the name of a witness upon a note or other contract not required by law to be witnessed.¹³ The following are some of the alterations held to be immaterial:¹⁴ The insertion of the dollar mark before the marginal figures; adding the Christian name of the drawer of a bill; substituting the firm style for the words, "Providence Steam Co.," when the parties did business under both names; changing the Christian name of the payee so as to make it conform to the fact; retracing a faded name in clear ink; changing the marginal figures of a note so as to conform to the written amount.

(4) When the contract sued on appears on its face to have been altered, the question arises whether the law will make any presumption as to the time when the alteration was made, *i. e.*, as to whether rightfully made before execution

⁹ Wood *v.* Steel, 6 Wallace, 82; Hamilton *v.* Wood, 70 Ind. 306.

¹⁰ Edelin *v.* Saunders, 8 Md. 131.

¹¹ Nicholson *v.* Combs, 90 Ind. 515.

¹² U. S. *v.* O'Neill, 19 Fed. Rep. 567. See U. S. *v.* Freel, 186 U. S. 309; Gardiner *v.* Harbuck, 21 Ill. 129; Brown *v.* Johnson, 126 Ala. 93; Miller *v.* Finley, 26 Mich. 249.

¹³ Milberg *v.* Stover, 75 Me. 69; Fuller *v.* Green, 64 Wis. 159.

¹⁴ From the notes to Master *v.* Miller, 2 Smith's Leading Cases.

or wrongfully made after execution. There are four rulings on this point:¹⁵

(a) That an apparent alteration raises no presumption either way, but like one not apparent, is a question of proof and fact for the jury.¹⁶

(b) That it raises a presumption against the paper and therefore requires explanation.¹⁷

(c) That it raises such presumption when it is suspicious, but not otherwise.¹⁸

(d) That the alteration is presumed to have been made before delivery and therefore requires no explanation, because a wrongful alteration is a fraud and a fraud is never presumed, but must be proved.¹⁹

(5) When a written contract has been materially altered, the person who made the alteration can not recover upon it. Whether such person can recover upon the original consideration or not, is a subject of dispute, but the weight of authority is to the effect that if the party made the alteration fraudulently he can not recover upon the original consideration, but may do so if the alteration was made heedlessly, or without fraudulent intent.²⁰

¹⁵ Abbott's Trial Evidence, 406.

¹⁶ *Malarin v. U. S.*, 1 Wallace, 288, cases; *Hayden v. Goodnow*, 37 Conn. 164; *Nesbit v. Turner*, 155 Pa. 429; *Comstock v. Smith*, 26 Mich. 306. Cf. *Sirrinc v. Briggs*, 31 Mich. 443; *Catlin Co. v. Lloyd*, 180 Ill. 398. Parol evidence is of course admissible to prove that an alteration has been made. *Davis v. Hamblin*, 51 Md. 541.

¹⁷ *Mortag v. Linn*, 23 Ill. 551.

¹⁸ *U. S. v. Linn*, 1 Howard, 119; *Burgwin v. Bishop*, 91 Pa. 336; *Franklin Trust Co. v. P., B. & W. R. Co.*, 222 Pa. 96.

¹⁹ *Wickes v. Caulk*, 5 H. & J. 36; *Edelin v. Saunders*, 8 Md. 118; *Boothby v. Stanley*, 34 Me. 515; *Wilson v. Hayes*, 40 Minn. 531.

²⁰ *Owen v. Hall*, 70 Md. 97; *Matteson v. Ellsworth*, 33 Wis. 488; *Hunt v. Gray*, 35 N. J. L. 227; *Hayes v. Wagner*, 89 Ill. 390; *Booth v. Powers*, 56 N. Y. 22.

CHAPTER VII.

DISCHARGE OF RIGHT OF ACTION

§ 206. **Modes of Extinguishment.** When one of the parties to a contract has broken it, the right of action for damages to which the other party then becomes entitled is a property right. This right can only be extinguished by his consent, or by being merged in a judgment, or by being barred by limitation, or, in the case of certain personal actions, by the death of a party.¹

Discharge by consent of the parties, is effected either by a Release or by an Accord and Satisfaction.

A *release* is a waiver of one's right of action, and, like other voluntary promises, must be under seal in order to be binding.² The seal is similar to, and as effectual as, the sacramental words used in the Roman *stipulatio*, or in the release of a *stipulatio*. A covenant not to sue, when absolute and not conditional, is generally treated as a release.³

§ 207. **Accord and Satisfaction** is an agreement between the parties after breach of the contract by one party by which the other party who is entitled to a right of action on account of the breach,—the creditor—agrees to accept a certain thing or performance from the party guilty of the breach,—the debtor—in place of the performance of the contract and in discharge of the right of action. When that agreement or accord is carried out by the debtor, it constitutes a satisfac-

¹ As to discharge of right of action by death, see *Batthyany v. Walford*, 36 Ch. D. 269. The common law maxim is, *Actio personalis moritur cum persona*. A contract for the rendition of personal services is discharged by death on the ground of impossibility, see *ante*, § 194.

² *Ingersoll v. Martin*, 58 Md. 67; *Williams v. Stern*, L. R. 5, Q. B. D. 409. A voluntary promise not to sue does not discharge the right of action. *De Bussche v. Alt*, 8 Ch. D. 286.

³ *Line v. Nelson*, 38 N. J. L. 358.

tion of the claim against him. A mere promise by a creditor not to sue on his claim is not binding because without consideration, but if there is a consideration and it is executed, that and the promise not to sue constitute the accord and satisfaction.

When property is delivered in satisfaction of a debt or claim for damages under an accord to that effect, the law presumes that it is more valuable to the creditor than the debt, no matter what its real value is, and the agreement to discharge is binding.¹ So a delivery of wood to the holder of a promissory note under an agreement that it shall be taken in satisfaction of the note is not payment thereof, but it may be a bar to an action on the note by virtue of an independent agreement made subsequent to default on the note as an accord and satisfaction.²

At common law the terms accord and satisfaction were strictly copulative. Accord without satisfaction was no defense to a suit on the original cause of action nor was satisfaction without accord. "Accord is a satisfaction agreed upon between the party injuring and the party injured which when performed, is a bar to all action upon this account."³

The effect of this rule is that if, after breach of a contract, the creditor agrees to accept a certain thing or performance in extinguishment of his right of action, that agreement does not prevent him from suing for the breach at any time before the thing promised is actually delivered and accepted, or the performance made. The reason given for this in an old case was that, "accord executed is satisfaction, accord executory

¹ *Bull v. Bull*, 43 Conn. 455; *Savage v. Everman*, 7 Pa. St. 315. An executory agreement for the accord of a pending suit is ineffectual until executed. *Herman v. Orcutt*, 152 Mass. 405.

² *Ulsch v. Muller*, 143 Mass. 379.

³ *Blackstone Com.* 315. See also *Ford v. Beech*, 11 Q. B. 852; *Day v. McLea*, L. R. 22, Q. B. D. 610. A tender of satisfaction is not the same thing as satisfaction. *Clifton v. Litchfield*, 106 Mass. 34.

is only substituting one cause of action in the room of another which might go on to any extent."⁴

Therefore an accord before it is executed by the debtor does not suspend the creditor's right of action but merely renders him liable to another action if he brings a suit in violation of his agreement.⁵

§ 208. **Modification of the Rule.** More recent cases modify this strict rule by holding that if the person entitled to a right of action agrees to accept a promise from the other party and not the performance of that promise in discharge or suspension of his right, that is a bar to an action.¹ The question is whether the new promise itself merely, or the performance of that promise, is the thing which the creditor agrees to receive in satisfaction. If he contemplated the performance of the new promise as the thing to be received in satisfaction, then his right of action remains in force until performance is made. If after breach, the parties expressly agree to rescind the contract broken and make a new contract with reference to the same subject-matter, that operates as a bar to any right of action for the breach.²

§ 209. **Payment of Less Than the Amount Due in Satisfaction.** An accord and satisfaction is a contract and must be supported by a consideration. Therefore as has already been shown, the payment of part of the liquidated and undisputed debt is not a satisfaction for a promise to relinquish the residue of the debt, although accepted as a satisfaction.¹

⁴ *Lynn v. Bruce*, 2 H. Blackstone, 319. This reason is not an historically accurate account of the origin of the rule. Its true ground now is that the creditor generally contemplates an actual performance by the debtor and not a mere promise to perform.

⁵ *Very v. Levy*, 13 How. 349; *Hunt v. Brown*, 146 Mass. 253; *Schweider v. Lang*, 29 Minn. 256; *Ford v. Beech*, 11 Q. B. 852.

¹ *Kromer v. Heim*, 75 N. Y. 574; *Simmons v. Clark*, 56 Ill. 96; *Evans v. Powis*, 1 Ex. 601.

² *Ins. Co. v. Detwiler*, 23 Ill. App. 656; *Dreifus v. Salvage Co.*, 194 Pa. 487.

¹ See *ante*, pp. 104, 105, 107; *Nassoig v. Tomlinson*, 148 N. Y. 330; *Laroe v. Sugar Loaf Co.*, 180 N. Y. 370; *Creighton v. Gregory*, 142 Cal. 34.

§ 210. **Satisfaction of Claim by Third Party.** If a creditor accepts money or property from a stranger in satisfaction of his claim against the debtor, that is a valid accord and satisfaction and may be pleaded as such, provided the debtor either previously authorized the third party to make satisfaction for him or afterwards ratified his act in doing so.¹

It has been held that when the payment is made by a stranger, the prior authority or subsequent ratification by the debtor is necessary to discharge the debtor from liability to the creditor.² But it would seem reasonable to hold that if the creditor accepts satisfaction from a stranger to the contract that should bar his action against the debtor whether the latter ratified the act of the third party in making satisfaction or not. A son, for instance, should be able to pay a debt due by his father and thus relieve him from the annoyance of a suit although the latter may not expressly accept the favor. When a bill of exchange or promissory note has been protested for non-payment, any person may intervene and pay it *supra protest* for the honor of any person liable thereon and the holder of the bill or note is bound to accept such payment.

¹ *White v. Cannon*, 125 Ill. 412; *Marshall v. Bullard*, 114 Iowa, 462; *Snyder v. Pharo*, 25 Fed. Rep. 398. But in *Atlantic Dock Co. v. New York*, 53 N. Y. 64, it was held in an action of covenant that a plea of acceptance of satisfaction by the plaintiff from a stranger is not good. But *cf. Danziger v. Hoyt*, 120 N. Y. 190. In *Jackson v. Pa. R. Co.*, 66 N. J. L. 319, an express company agreed to indemnify a railroad company against claims for damages for injuries suffered on the railroad by employees of the former company. Jackson, an employee, was injured on the railroad, and accepted a sum of money from the express company "in full satisfaction and discharge of all claims" in respect of the accident. In a subsequent action by him against the railroad company, it was held that the plea of accord and satisfaction was good. The Court said: "Since a party is entitled to only one satisfaction, his acknowledgment that he has received it and his retention of it, operate to extinguish his right."

² *Simpson v. Eggington*. 10 Exch. 844.

CHAPTER VIII

REMEDIES FOR BREACH OF CONTRACT

§ 213. **Damages.** A breach of contract always affords a right of action, but, as has been seen, does not always exonerate the other party from further performance. If the breach is such as to discharge the contract, then the injured party may not only consider himself released from further liability, but sue at once for such damages as he has sustained; and if he has done or paid anything in furtherance of the contract he may sue for the same on a *quantum meruit*.¹

When a contract is broken, the ordinary remedy of the injured party is to sue for such damages as he has sustained by reason of the breach. But in some cases full justice is not achieved by this remedy alone, and equity will then interpose by a decree of specific performance or by the issuing of an injunction. The legal and equitable remedies will be briefly considered in turn.

Rules Relating to Damages.

(1) *Compensatory.* The object of the law in allowing pecuniary damages against a party adjudged guilty of a breach of contract is not to punish, or fine him for such breach, but to compensate the other party, as exactly as may be, for the pecuniary injury or loss he has sustained in consequence of the breach.² Therefore, when an employee has been wrongfully dismissed, in violation of the contract, he is not entitled to recover damages for the insulting and oppressive manner of his dismissal, but only for the pecuniary loss resulting from the breach of contract.³

¹ U. S. v. Behan, 110 U. S. 345; Black v. Woodrow, 39 Md. 194.

² Rittenhouse v. Baltimore, 25 Md. 337; Robinson v. Harman, 1 Ex. 855.

³ Addis v. Gramophone Co. [1909], App. Cas. 488.

Whenever a contract is broken, the law presumes that some damage has been sustained, and if the plaintiff should fail to prove any actual loss or injury, he is nevertheless entitled to a verdict for nominal damages.⁴

Sales of goods. In an action for the breach of a contract to buy or sell personal property, the measure of damages is the difference between the market price of the article at the time and place of delivery, and the contract price.⁵

In an action for breach of a warranty of quality, the measure of damages will be the difference between the value of the article with the defect warranted against, and the value it would have borne without that defect.⁶

Sales of land. Where the vendor of land wilfully refuses to perform his contract to convey it, the measure of damages in an action against him is the value of the land at the time of the breach, in excess of the contract price.⁷ But if the vendor had reasonable grounds for believing that he was the owner of the property at the time he contracted to sell it, and a defect in his title is afterwards discovered which prevents the performance of the contract, the purchaser will only be entitled to recover nominal damages, together with his deposit, if one was paid, and the expenses incurred in investigating the title.⁸

When the vendor did not have title to the land but expected to acquire it and his contract to sell to the plaintiff was of a

⁴ *McGrath v. Gegner*, 77 Md. 331.

⁵ *Roberts v. Benjamin*, 124 U. S. 64; *Noel Co. v. Atlas Cement Co.*, 103 Md. 209; *Pinckney v. Dambmann*, 72 Md. 173. If the buyer supplies himself by getting the goods before the date of delivery at a price less than that existing at that date, the measure of damages is the difference between that and the contract price. *Morris v. Supplee*, 208 Pa. 253. As to cases where there is no market price, see *Eq. Gas. Co. v. Balto. Coal Tar Co.*, 65 Md. 73.

⁶ *Lane v. Lantz*, 27 Md. 211; *Marsh v. McPherson*, 105 U. S. 717; *Leavitt v. The Fiberloid Co.*, 196 Mass. 440. As to breach of implied warranty, see *Queen City Glass Co. v. Clay Pot. Co.*, 97 Md. 429.

⁷ *Horner v. Beasley*, 105 Md. 193; *Clagett v. Easterday*, 42 Md. 618.

⁸ *Floreau v. Thornhill*, 2 W. Blackston, 1078; *Day v. Singleton* [1899], 2 Ch. D. 320; *Balto. Per., &c., Socy. v. Smith*, 54 Md. 187.

speculative character he must make good to the latter the profits that would have been made by him.⁹

(2) *Losses contemplated.* The damages which a plaintiff is entitled to recover for a breach of contract "should be such as may fairly and reasonably be considered as either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it."¹⁰

So, in an action to recover damages for breach of defendant's contract to deliver lumber of a designated kind at a certain time and place, to be used by the plaintiff in building a coal tippie, etc., for a railway company, the plaintiff is entitled to recover the expenses caused by the delay in getting other lumber in place of that furnished by the defendant and rejected for cause, the increased cost of construction by reason of the necessity of doing the work in the winter instead of the summer; the freight paid by the plaintiff on the rejected lumber, and the cost of unloading the same. These elements of damage may reasonably be supposed to have been within the contemplation of the parties at the time of making the contract.¹¹

If the seller knows that his failure to supply an article to be made by him for the buyer will compel the latter to shut down his factory, the damages thereby caused may be recovered since they ought to have been contemplated.¹²

⁹ *Pumpelly v. Phelps*, 40 N. Y. 59; *Hammond v. Hannin*, 21 Mich. 386. As to action for breach of contract to buy land, see *Md. Clay Co. v. Simpers*, 96 Md. 1.

¹⁰ *Hadley v. Baxendale*, 9 Exch. 341. See also *Swain v. Schieffelin*, 134 N. Y. 471; 18 L. R. A. 386; *Shafer v. Wilson*, 44 Md. 268; *Balto. & Ohio R. Co. v. Pumphrey*, 59 Md. 400; *Furstenburg v. Fawsett*, 61 Md. 187; *Howard v. Stillwell Co.*, 139 U. S. 207; *Mfg. Co. v. Creamery Co.*, 120 Iowa, 588; *Connersville Wagon Co. v. McFarland Co.*, 166 Ind. 123.

¹¹ *Canton Lumber Co. v. Liller*, 112 Md. 258.

¹² *Kelley, &c., Co. v. La Crosse Carriage Co.*, 120 Wis. 84. In *Mather v. Am. Express Co.*, 138 Mass. 55, it was held that in an action against a carrier for non-delivery of a package containing

When a seller knows that the buyer has a contract for the resale of the goods to a third party, the seller is liable for the damages which as a reasonable man he ought to know would result from the breach of his contract.¹³

In an action to recover damages for breach of defendant's contract to erect a passenger elevator of a designated character in plaintiff's office building, the plaintiff alleged that on account of the unsafe and defective construction of the elevator he lost large sums of money by the removal of tenants from the building on that account and by the failure to rent offices to others for the same reason. It was held that the loss of rents can not be treated as a part of the damages which the plaintiff was entitled to recover, since that loss was not such a probable result of the breach of the contract by the defendant as may reasonably be supposed to have been within the contemplation of the parties at the time they made the contract.¹⁴

plans for a building, there could be no recovery for the damages consequential upon the delay, since the carrier had no knowledge of the contents of the package. In *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 233, a broker sued a telegraph company to recover damages resulting from its failure to transmit a dispatch containing the following order, "sell fifty gold." It was proved that the dispatch would be understood among brokers to mean, sell \$50,000 of gold; but since it was not shown that the company's agent so understood it, it was held that the nature of the dispatch should have been communicated to the company at the time it was offered in order that the necessary precautions might have been taken, and that it was error to instruct the jury that the plaintiff was entitled to recover to the full extent of his loss. But in *W. U. Tel. Co. v. Lehman*, 105 Md. 442, it was held that a telegram stating that cattle had been shipped was sufficient notice to the company of the probable consequences of a delay in its delivery.

¹³ *Hammond v. Bussey*, L. R. 20 Q. B. D. 79; *Agius v. Great Western Col. Co.* [1899], 1 Q. B. 413; *Bostock & Co. v. Nicholson & Sons* [1904], 1 K. B. 725. As to when loss of anticipated profits may be recovered as damages in an action for breach of a contract to buy or sell, see notes to *Guetzkow v. Andrews & Co.*, 92 Wis. 214, in 52 L. R. A. 209, and to *Wells v. Nat. Life Assn.*, 99 Fed. 222, in 53 L. R. A. 33, and *Armistead v. Shreveport, &c., R. Co.*, 108 La. 171.

¹⁴ *Winslow Elevator Co. v. Hoffman*, 107 Md. 621.

When a contract has been made under special circumstances and these were communicated to the defendant then, in case of a breach, the plaintiff is entitled to recover as damages the amount of the injury which would ordinarily follow from a breach. But whether such special damages may reasonably be supposed to have been in the contemplation of both parties depends upon how much of the real situation was so disclosed.¹⁵

The special circumstances which may render a breach more than ordinarily injurious to the one party must be known by the other party whom it is sought to charge with the loss, at the time the contract was made and not afterwards.¹⁶

(3) *Remote Damages.* Remote, speculative or contingent damages are not recoverable.¹⁷ Where a mill was not completed within the time specified in the contract, the owner's damages are to be estimated by what is a fair rent of the mill during the time he was kept out of its use. He cannot be allowed estimated profits from the working of the mill, because such are merely speculative, depending upon the quantity of flour it might grind, fluctuations in prices, and the remote contingencies of his being able to procure wheat, labor and fuel, as well as the continuance of the mill in running order, or loss of time from other causes.¹⁸

No action, either in contract or in tort, can be maintained by a tenant or one of his family against a landlord to recover damages for personal injuries caused by a defect in the demised premises, merely because the landlord has broken his contract to make necessary repairs, since such damages

¹⁵ Webster v. Woolford, 81 Md. 329; Grebert v. Nugent, L. R. 15 Q. B. D. 85; Horne v. Midland Ry. Co., L. R. 8 C. P. 131.

¹⁶ Globe Refining Co. v. L. C. Oil Co., 190 U. S. 544.

¹⁷ Howard v. Stillwell Mfg. Co., 139 U. S. 199; W. U. Tel. Co. v. Hall, 124 U. S. 444; Wood v. State, 66 Md. 61; Phelps v. George's Creek, &c., Co., 60 Md. 536; Hamill v. Foute, 51 Md. 420; Bullock v. Bergman, 46 Md. 271; Cook v. England, 27 Md. 14.

¹⁸ Abbott v. Gatch, 13 Md. 315. See also United Surety Co. v. Summers, 110 Md. 95. Loss of immediate profits is a proper element of damages. Wakeman v. Wheeler, 101 N. Y. 205.

are too remote and are not the ordinary result of the breach of such a contract.¹⁹

(4) *Diminishing loss.* It is the duty of a party to do what he reasonably can to diminish the loss caused by a breach of the contract by the other party, and he cannot recover for such consequential damage as the exercise of ordinary care on his part would have averted.²⁰

(5) *Interest* is recoverable as of right upon all contracts to pay money upon a day certain, as upon bills of exchange, or where goods sold and delivered are to be paid for at a given time.²¹ In other cases the allowance of interest is within the discretion of the jury.²²

(6) *Difficulty in assessment.* When it is certain that damages have been caused by a breach of contract, a recovery is not prevented by the fact that the amount of damages is uncertain, or its ascertainment difficult.²³

(7) *Liquidated damages.* When the parties have agreed in the contract upon the amount of damages which would be caused by a breach, that sum may be recovered when really liquidated damages and not a penalty.²⁴

¹⁹ *Thompson v. Clemens*, 96 Md. 196. See also *Tuttle v. Gilbert Co.*, 145 Mass. 169; *Dustin v. Curtis*, 74 N. H. 266. The failure of a landlord to put in a furnace as he had voluntarily promised to do does not render him liable for injuries to tenants caused by the cold. *Glenn v. Hill*, 210 Mo. 291. As to the measure of landlord's liability for breach of contract to repair, see *Galvin v. Beals*, 187 Mass. 252; *Shute v. Bills*, 191 Mass. 437.

²⁰ *Warren v. Stoddard*, 105 U. S. 229; *Lawson v. Price*, 45 Md. 123.

²¹ *Newson v. Douglas*, 7 H. & J. 418; *Brown v. Hardcastle*, 63 Md. 484; *Cooper v. Coates*, 21 Wallace, 105. Whether interest may be recovered is held in some jurisdictions to be a matter of law for the Court. *Mansfield v. R. R. Co.*, 114 N. Y. 331. The English rule is that interest is not recoverable even for failure to pay a definite indebtedness, unless there was a promise to pay interest. *In re Marquis of Anglesey* [1901], 2 Ch. 548.

²² *Kirk v. Grant*, 67 Md. 418; *Planters, etc., Co. v. Rowland*, 66 Md. 236; *Curtis v. Gibney*, 59 Md. 131; *Bernei v. Baltimore*, 56 Md. 351.

²³ *Robinson v. Harman*, 1 Ex. 855; *Simpson v. L. & N. W. Ry. Co.*, L. R. 1 Q. B. D. 274; *Wakeman v. Wheeler*, 101 N. Y. 205.

²⁴ See *ante*, pp. 363-370.

§ 214. **Specific Performance.** Equity has jurisdiction to enforce performance of a promise to do a thing by a decree ordering its specific performance, and to enforce a promise not to do a thing by an injunction.

Specific performance will not be decreed when the common law remedy of an action for damages is adequate to the loss sustained, and will be more readily granted when the contract relates to the conveyance of land than when it concerns personal property or services. It is a general principle that equity will not decree specific performance of "contracts for the sale of goods and chattels, not, however, because of the nature of the property, the subject-matter of the contract, but because damages at law, calculated on the market price of the goods bargained for, furnish, in ordinary cases, an adequate redress to the purchaser for the breach of the bargain by the vendor. But there are many exceptions to this general rule, founded principally upon the inadequacy of the remedy at law in the particular case, or the special and peculiar nature and value of the subject-matter of the contract."¹

A contract for the sale and delivery of chattels which are essential in specie to the plaintiff, and which the defendant can supply, while no one else can, will be specifically enforced.²

So a contract to sell shares of stock in an ordinary business corporation will not be specifically enforced, but when the stock is limited in amount and held by few persons, specific performance will be granted.³ Specific performance will be decreed of a contract by the owner of a patent right to furnish articles covered by the patent, which he alone

¹ *Eq. Gas Co. v. Balto. Coal Tar Co.*, 63 Md. 299.

² *Buxton v. Lister*, 2 Atk. 385; *Pomeroy on Specific Performance*, § 15. In *Eq. Gas Co. v. Balto. Coal Tar Co.*, 63 Md. 299, a contract to supply plaintiff company with coal tar, which it could not obtain, if defendant refused to fulfill contract, except from distant cities and at great expense, was enforced.

³ *Goodwin, etc., Co.'s Appeal*, 117 Pa. 514.

can supply, when they can be made without the exercise of any peculiar skill.⁴

The Court will direct a building contract to be specifically performed when the work to be done is clearly defined and the plaintiff can not be adequately compensated by damages.⁵

A contract made before maturity of a debt by which the creditor agrees to accept a lesser sum in satisfaction and to return certain shares of stock pledged as collateral security may be specifically enforced.⁶

An action for damages for breach of a contract is often an illusory remedy and in some States statutes have been enacted which provide that specific performance of a contract shall not be refused on the mere ground that the party seeking its enforcement has an adequate remedy in damages, unless the defendant shall show to the Court's satisfaction that he has property from which such damages may be made or shall give bond with approved security to perform the contract or to pay all such damages and costs as may be adjudged against him for breach of the contract. Under such a statute it has been held that a contract to saw boards of a certain length and thickness may be specifically enforced, since it does not require the exercise of such special skill as to be for that reason beyond the power of the Court to supervise.⁷

It is another general principle that equity will not decree specific performance of a contract unless it be fair, certain and mutually binding upon the parties.⁸

When the Court can not enforce a decree for performance by its own supervision, this remedy will not be granted. So

⁴ *Adams v. Messinger*, 147 Mass. 485.

⁵ *Wolverhampton v. Emmons* [1901], 1 K. B. 515. Cf. *Busey v. McCurley*, 61 Md. 436; *West Boundary Co. v. Bayless*, 80 Md. 504.

⁶ *Chicora Fer. Co. v. Dunan*, 91 Md. 144; *Turner v. Green* [1895], 2 Ch. 205.

⁷ *Neal v. Parker*, 98 Md. 254. But cf. *Marble Co. v. Ripley*, 10 Wallace, 339.

⁸ *Dalzell v. Watch Co.*, 149 U. S. 315; *Md. Clay Co. v. Simpser*, 96 Md. 1; *Engler v. Garrett*, 100 Md. 387. As to the specific enforcement of an option to purchase land, see *ante*, p. 330.

a contract to provide a resident porter for an apartment-house will not be specifically enforced, since the constant supervision of the Court would be required.⁹ And generally contracts for personal services, such as an agreement to paint a picture, or write a book, or act at a theatre, will not be specifically enforced.¹⁰ It will be seen in the next section, however, that in some cases a party will be restrained by injunction from doing certain things in derogation of a contract of personal services.

It is another principle that the granting of specific performance is not a matter of right, but is within the discre-

⁹ *Ryan v. Mutual Tontine Assn.* [1893], 1 Ch. 126.

¹⁰ The following anecdote from "Gossip of the Century," Vol. 2, p. 40, illustrates the absurdity of decreeing specific performance of such contracts. Rossini had agreed to write an opera for Prince Torlonia, the Roman banker, and deliver it within a certain time to the manager of the Apollo Theater in Rome. "The libretto—the subject of which was Corradino—had been given him; time went by, but the Maestro made no sign; the Prince continued to press him, but without result; Rossini only shrugged his shoulders, and gave his patron to understand that, short of an inspiration, he could produce nothing, adding with grim facetiousness, "An opera can't be turned out like a dish of macaroni." The "inspiration" excuse was allowed for a reasonable time, and then the Prince, exasperated, tried the serious remedy of a legal action. Rossini, summoned before the Tribunal of Commerce, dispensed with the assistance of a lawyer, and pleaded his own cause; notwithstanding his eloquence, however, the Tribunal condemned him to produce the promised work, and deliver it within two months on pain of a heavy fine. The Composer was furious; he went home, shut his doors, and would not be seen for two days; on the third day he presented himself at the Prince's house with bundles of MS. under his arms. "The Court," he said, "condemned me to write an opera in two months, which shows how much such people know about music, and how much more quickly it can be written than they suppose; there is your opera; I have written it in two days!"

"Torlonia was enchanted; but his satisfaction was not very long-lived, for when he handed the score to the conductor of the orchestra, a rapid glance sufficed to reveal to the professional expert the trick played off by the unwilling composer. "Impossible," said he, "to play that! There is not a bar of new music in it; it is neither more nor less than a 'potpourri,' consisting of melodies by Rossini well known and already popular." Of course, this opera was never put on the stage."

tion of the Court.¹¹ The meaning of this principle is "not that the Court may arbitrarily or capriciously perform one contract and refuse to perform another, but that the Court has regard to the conduct of the plaintiff, and to circumstances outside of the contract itself, and that the mere fact of the existence of a valid contract is not conclusive in the plaintiff's favor."¹²

§ 215 **Injunction.** The Court is sometimes asked, not to enforce a promise to do a thing by a decree for specific performance, but to restrain the defendant by an injunction from such dealings with other parties as would be a breach of his contract with the plaintiff.

Where the contract between the owner of a department store and the manufacturer of patterns for garments provided that the former should supply floor space for the latter and not sell or allow to be sold on its premises any other patterns, an injunction was granted to restrain such sale.¹

The violation of a contract not to carry on a certain business in a given locality will be restrained.²

When an innkeeper has agreed to buy beer exclusively from the plaintiff he will be enjoined from buying beer from others.³

¹¹ *Hennessey v. Woolworth*, 128 U. S. 438; *Pope Mfg. Co. v. Gormally*, 144 U. S. 224.

¹² *Fry on Specific Performance*, § 44; *Bamberger v. Johnson*, 86 Md. 41.

¹ *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60; 43 L. R. A. 854. *Cf. St. Regis Paper Co. v. Santa Clara Lumber Co.*, 173 N. Y. 160; *Donnell v. Bennett*, L. R. 22 Ch. D. 835.

² *Guerand v. Dandele*, 32 Md. 570; *McClurg's Appeal*, 58 Pa. 51; *Harkinson's Appeal*, 78 Pa. 196.

³ *Catt v. Tourle*, L. R. 4 Ch. 654; *Clegg v. Hands*, L. R. 44 Ch. D. 503. "In *Martin v. Nutkin*, 1 P. Williams, 266 (1724), certain churchwardens who represented the parish had agreed with the plaintiffs to suspend the ringing of a bell at 5 o'clock in the morning of each day, in consideration of money paid by the plaintiffs for the erection of a clock and cupola. Lord Macclesfield in the first instance and subsequently the Lords Commissioners granted an injunction to restrain the ringing of the bell during the lives of the plaintiffs."

If a party agrees to take all the electrical energy he may require on his premises from a certain company he will be enjoined from taking electricity from others.⁴

An injunction was held to be the proper remedy to restrain violation of this contract: "We, the undersigned, merchants of Russellville, do hereby agree and obligate ourselves to close our places of business at 6.30 o'clock beginning May 15, 1895, and lasting till 1st September."⁵

When personal services are contracted for the doctrine of some Courts is that when the contract is merely affirmative in its provisions, as, for example, the contract of an actor to perform at a particular theatre, the Court will not imply a negative promise not to act elsewhere and enjoin the actor from performing elsewhere, when the contract is not such an one as could be specifically enforced.⁶ But when the contract is of a nature proper to be specifically enforced, the Court will interfere by injunction, although the negative obligation may be only implied from the positive terms of the agreement.⁷

In *Lumley v. Wagner*,⁸ the defendant agreed to sing at the plaintiff's theatre during a certain time and to sing nowhere else. An injunction was granted to restrain the defendant from singing at another theatre, although the positive promise to sing at the plaintiff's theatre could not be specifically enforced. The Lord Chancellor said that he would not have interfered but for the negative clause.

⁴ Metropolitan Elec. Co. v. Ginder [1901], 2 Ch. 799.

⁵ *Stovall v. McCutcheon*, 107 Ky. 577. In *Welty v. Jacobs*, 171 Ill. 624, where there was a contract to furnish a theatre with light, music, ushers, etc., for a certain time, the Court refused to enjoin the proprietor from renting the theatre to others.

⁶ *Burton v. Marshall*, 4 Gill, 487. See 3 Pomeroy Eq. Jur. § 1343.

⁷ *Eq. Gas Co. v. Balto. Coal Tar Co.*, 63 Md. 300.

⁸ 1 D. M. & G. 504. The Courts are disinclined to restrain the breach of a contract for personal services, but leave the parties to the remedy at law. *Whitwood Chem. Co. v. Hardman* [1891], 2 Ch. 428; *Ehrman v. Bartholomew* [1898], 1 Ch. 671; *Fothergill v. Rowland*, L. R. 17 Eq. 132. Sometimes an employee whose service was of a confidential nature is restrained from entering a rival business in violation of his contract. *Robinson v. Heuer* [1898], 2 Ch. 451; *McCall Co. v. Wright*, 198 N. Y. 143; 31 L. R. A. (N. S.) 249.

Where a baseball player, described by the Court as being "a bright, particular star in the baseball firmament," agreed to play for a certain club and not to play for any other, an injunction was granted restraining him from playing for a rival club during the time of his engagement.⁹

⁹ Phil. Base Ball Club *v.* Lajoie, 202 Pa. 210. See also Cort *v.* Lasard and Lucifer, 18 Ore. 221.

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